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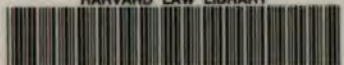
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# CASES

DECIDED IN THE

## Supreme Court of Ohio

### IN BANK

AT DECEMBER TERM, 1839

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REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

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By CHARLES HAMMOND  
ATTORNEY AT LAW

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**CASES DECIDED**  
**BY THE**  
**SUPREME COURT OF OHIO,**  
**IN BANK,**  
**AT DECEMBER TERM, 1889.**

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**JUDGES PRESENT.**

**EBENEZER LANE,**  
**REUBEN WOOD,**

**PETER HITCHCOCK,**  
**FREDERICK GRIMKE,**

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**HART, DUBOIS, & Co. v. J. & J. AYRES.**

When a promissory note is given in evidence under the money counts in *assumpsit*, no other defence will be received against it, than would be received if the note was offered in evidence under a special count upon it.

*ASSUMPSIT* for money had and received: plea, non-*assumpsit*. From Cuyahoga. The only evidence offered by the plaintiffs, was a promissory note of the defendants, dated Oct. 1st, 1834, to the plaintiffs or order, for \$336 70, payable on the first of January then next. The defendants then offered to prove that the note was executed and delivered for the purpose of taking up a note previously given, for some interest in a patent right. Upon the admission of this evidence, the judges on the circuit were divided in opinion.

S. J. ANDREWS, J. A. FOOT, and HOYT, for plaintiffs, insisted that where a note is given in evidence under a money count, and the legal liability of the defendant is admitted, the suit can not be defeated by proof that the consideration of the note was not money. The point is expressly decided in *Hughes v. Wheeler*, 8 Cow. 77. It is not necessary in a suit for money had and received, to prove the actual

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Hart, Dubois, & Co. v. Ayres.

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receipt of money. *Randall v. Rich*, 11 Mass. 494; *Beardsley v. Root*, 11 Johns. 464; *Tuttle v. Mayo*, 7 Johns. 132; 3 Mass. 403; *Clark v. Pinney*, 6 Cow. 297.

6] \*H. FORTÉ, for defendants. The simple question is, whether a promissory note given by the defendants to the plaintiffs, and offered in evidence under a count for money had and received, is conclusive evidence of the receipt of money, or open to explanation? We contend the note is only *prima facie* evidence of the receipt of money, and the fact open to other evidence. He cited, Ch. on Bills, 8th Am. ed. 67, 596 7, 575, 592; *Nightingale et al v. Devisme*, 5 Bur. 2589; 2 Kent. C. 80; 1 Esp. C. 117; 2 T. R. 71; 5 Pick. 391; 6 Conn. 521; 8 Cow. 77; 2 Phil. Ev. 10; 2 Stark. Ev. 301, 2, 4, 5; 2 Esp. C. 245; *Farr v. Price*, 1 East. 55; *Brown v. Watts*, 1 Taun. 353; *Morley v. Peet*, 5 Esp. 121; 1 Sand. P. & Ev. 278; 1 Salk, 283; Bayly on Bills, 165, 487; Com. on Con. 340; *N. J. Banking Co. v. Myers*, 7 Halst. 141; 1 Wh. Selw. 331; *Gibson v. Merritt*, 3 Blk. 602; *Whitwell v. Bennett*, 3 B. & P. 559; *Barlow v. Bishop*, 1 East. 432; *Page's ad. v. Bk. of Alexandria*, 7 Wheat. 35; *Sheely v. Mandeville*, 7 Cranch. 209; *French's ad. v. Bk. of Alexandria*, 4 Cranch 141; *Mackey v. Davis*, 2 Wash. 219; *Godall v. Stewart*, 2 Hen. & M. R. 105.

By the Court, GRIMKE, Judge: It is contended on the part of the plaintiffs, that where a note is given in evidence under a money count, and the legal liability of the defendant is admitted, the suit can not be defeated by showing that the consideration was not money. The defence is strictly a technical one; and is made in a form of action, supposed to have been invented for the express purpose of guarding against difficulties of that nature. It is true doubts have been constantly expressed whether great inconveniences would not be incurred in consequence of the generality of this form of action, but these doubts have been almost uniformly dissolved, so as to give the action the utmost liberality. Thus in *Newman v. M'Gregor*, 5 Ohio. 350, it was held, that where payment was to be made in specific articles, a recovery might be had under the common counts. That is not precisely the same case with the present, inasmuch as in the former the contract was by the defendants to pay to the plaintiffs articles other than money, while in this the promissory note is relied upon as evidence of the receipt of money by the defendants for the plaintiffs, but the cases are not distinguishable from each other in spirit. The decision in 5 Ohio, 350, affords a strong manifestation of the liberal

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Lessee of Hollister v. Hunt.

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construction which this court has been disposed to apply to the common counts in assumpsit. In *Tuttle v. Mayo*, 7 Johns. 132, where \*the plaintiff wholly failed to make out a special agreement, he was [7] permitted to recover under a count for money had and received. It was held that it was not necessary in all cases to give particular evidence that money had been received belonging to the plaintiff, when from the facts it may be fairly presumed. This construction has been confirmed in a still later case, *Beardsley v. Root*, 11 Johns. 464, in which it was determined, that where an attorney purchased land sold on an execution and paid for it by the discharge of the judgment, that this action might be maintained against him. In *Randall v. Rich*, 11 Mass. 494, a suit for money had and received, was sustained where land had been received instead of money. In *Hughes v. Wheeler*, 8 Cow. 77, the rule has been laid down in a clear and decisive manner, that a promissory note is conclusive evidence under the money counts of a pecuniary consideration, and it is no defence to show the note given for other consideration. It is needless to say there are authorities which go a great way in contradicting these cases. That is never the greatest difficulty in attaining a sound and satisfactory determination of a question, since in the progress made in the formation of a general rule, particularly one intended to be applied to mere form of suit, the distinctions will be so nice, that the mind may be equally perplexed on the one side and on the other. Suffice it to say, that on a question which admits so little of the application of the general principles of the law, where there are numerous authorities sustaining the opinion, and where from the actual state of the law, we are, to say the least, at liberty to adopt a rule which shall be at once most liberal, and most conducive to the ends of justice: and in this case, we have no hesitation in saying that the evidence offered by the defendants should be overruled.

Judgment for plaintiffs.

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8] \*LESSEE OF JOHN HOLLISTER v. JOHN E. HUNT.

Under the Act of Congress of the 28th of February, 1823, authorizing the State of Ohio to construct a road from the Lower Rapids of the Miami of the Lake to the west line of the Western Reserve, and for granting land for the construction of the same, no land is granted to the State northwest of said Miami River.



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Lessee of Hollister v. Hunt.

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A grant to the State of Ohio, to enable her to open and construct a road, of "a tract of land 120 feet wide whereon to locate the same, together with a quantity of land equal to one mile on each side thereof and adjoining thereto, to be bound by sectional lines as run by the United States," passes no land beyond the termini of the road, though the section line is beyond.

EJECTMENT, reserved in Lucas. This case was submitted upon documentary evidence and an agreed state of facts.

The land in controversy is a part of section six, township four, of the Miami Reserve. This section crosses the river Miami of the Lake, and a portion of it is situated upon the south and a portion upon the north side of the river. When originally surveyed, the land within the lines of the section which was covered by water, was deducted from the number of acres constituting a section, leaving a fraction upon each side of the river. It is agreed that in such case, it is the practice of the government of the United States to sell the fractions separately, and that the Miami is a navigable river.

On the 14th of July, 1825, the land in controversy, which is the fraction of section No. 6, lying upon the north side of the Miami River, was taken, surveyed, and appropriated by a superintendent duly appointed, as a part of the lands granted by the United States to the State of Ohio, for the purpose of constructing the Western Reserve and Miami Road. It was sold to the lessor of the plaintiff, and conveyed to him by the Governor of Ohio, by deed bearing date January 2, 1827. It is further agreed that the western termination of the Western Reserve and Miami Road, is a point on the south shore of the Miami river, within said section No. 6, and that all the unappropriated and unsold lands in said section, were taken by the Superintendent of the road as road lands.

The defendant claims title under a patent from the President of the United States, bearing date December 12, 1833. By this patent the land in controversy was granted to John Baptiste Brawgrand in his own right, and to John E. Hunt as assignee of Gabriel Godfrey. This patent was based upon a pre-emption right of Brawgrand and Godfrey, and much evidence was introduced relative to this claim, but in the view taken by the court of the case, it is unnecessary to recapitulate it.

\*COFFINBURY and SPINK for plaintiff.

W. SILLIMAN for defendant.

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Lessee of Hollister v. Hunt.

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By the Court, HITCHCOCK, Judge: As the title of the plaintiff to the premises in controversy is derived from the State of Ohio, the first inquiry to be made is, whether those premises were ever vested in the State? It is claimed for the plaintiff that the title to this property was vested in the State by an Act of Congress of the 28th February, 1833, granting certain lands to the State for the purpose of constructing a road from the Miami of Lake Erie to the west line of the Connecticut Western Reserve. The Act may be found at the 152d page of the Ohio Land Laws, published in 1825.

By the first section it is enacted, "That the State of Ohio is hereby authorized to lay out, open, and construct a road from the lower rapids of the Miami of Lake Erie, to the western boundary of the Connecticut Western Reserve, in such manner as the Legislature of said State may by law provide, with the approbation of the President of the United States; which road, when constructed, shall ever remain a public highway."

In the second section it is enacted, "That in order to enable the State of Ohio to open and construct said road, a tract of land one hundred and twenty feet wide, whereon to locate the same, together with a quantity of land equal to one mile on each side thereof, and adjoining thereto, to be bounded by sectional lines, as run by the United States, to defray the expense of making said road, is hereby granted to said State, to commence at the Miami Rapids, and terminate at the western boundary of the Connecticut Western Reserve." In the third section it is provided, that if any of the lands through which it might "*be thought expedient to open said road,*" should have been sold by the United States, the Secretary of the Treasury should pay to some officer to be appointed by the State of Ohio, the net proceeds of the sales of the quantity thus sold at the minimum price, And in the fourth section the President of the United States is required to "direct, that until the first day of June, one thousand eight hundred and twenty-three, none of the public lands shall be sold within three miles, on each side of a line to be drawn direct from the foot of the rapids of the Miami of Lake Erie, to the Lower Rapids of Sandusky, thence to the western boundary of the Connecticut Western Reserve."

It would seem that there could be little difficulty in ascertaining the lands included in this grant. In the first place, there is the land upon which the road itself is to be opened, consisting of a strip one  
10] \*hundred and twenty feet wide, commencing at the Lower Rapids

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Lessee of Hollister v Hunt.

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of the Miami, and running thence to the west line of the Connecticut Western Reserve. Next, for the purpose of constructing the road, a quantity of land is granted equivalent to one mile in width on "*each side thereof*." This land is to be taken on "*each side*" of the road "*and adjoining thereto*," and is "to be bounded by sectional lines as run by the United States." If any of the land thus described, had been sold by the United States, other lands were not to be given in lieu thereof, but the avails of the sale, estimating the same at the minimum price, were to be paid over to the State of Ohio. And in order that the lands intended to be granted, should not be sold until the State of Ohio might have time to signify its acceptance, the President of the United States is required to direct that for a limited time "none of the public land shall be sold within three miles of each side of a line, to be drawn direct from the foot of the Rapids of the Miami of Lake Erie to the lower rapids of Sandusky; thence to the western boundary of the Connecticut Western Reserve." The contemplated road itself was to be constructed *from* the lower rapids of the Miami *to* the west line of the Connecticut Western Reserve. The river and the west line of the Reserve were to be its termini, and it would cross over neither the one nor the other. The land granted was to be on "*each side*" of, and "*adjoining to*" said road, and the land reserved from sale was limited to the Miami River on the west, and the Connecticut Western Reserve on the east. Under these circumstances there can be no well founded pretense, that it was the intention of Congress to grant any other lands to the State of Ohio than such as were situate between the Miami River and the west line of the Connecticut Reserve.

The State of Ohio accepted this grant upon the terms and stipulations in the Act of Congress contained, and a road was surveyed and opened, commencing at the Lower Rapids of the Miami, on the south shore of the river, thence running to the Lower Rapids of the Sandusky, and thence to the west line of the Connecticut Reserve; and by such acceptance she became entitled to the land on "*each side*" of and "*adjoining*" to this road, not exceeding two miles in width.

Is the land in controversy within this grant? It is not between the "west line of the Connecticut Reserve and the Miami River of Lake Erie." It is not "*adjoining*" the road, but is separated from its western termination by a navigable river. It is on neither "*side*" of said road. With what propriety then can it be claimed to be within the grant?

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Cincinnati, Lebanon, and Springfield Turnpike Co. v. Neil and others.

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\*But it is argued by counsel for the plaintiff, that inasmuch as [1] the land taken by the State was to be bounded by sectional lines, and as the road runs into the section of which the land in controversy constitutes a part, therefore the State was entitled to the entire section. In arriving at a construction to this grant, the whole must be taken together, and taking the whole together, the entire lands granted, are situate east of the Miami River. Section No. 6 is, by the river, divided into two fractions, one on the south and the other on the east side of the river. The road terminates at the north line of the southern fraction. To that fraction the State was entitled, and the clause in the statute requiring the State to take by sectional lines, is complied with, when she is required to take this fractional section by its lines as surveyed by the United States.

Such being the opinion of the Court, the title of the plaintiff fails, and the defendant must have judgment.

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THE CINCINNATI, LEBANON, AND SPRINGFIELD TURNPIKE CO.

v.

WILLIAM NEIL AND OTHERS.

The Act incorporating the Cincinnati, Lebanon, and Springfield Turnpike Company authorizes the Company to collect tolls from mail and passenger four wheel stages, at the rate imposed on *coaches*.

A clause imposing tolls upon "coaches, chariots, and other four wheeled pleasure carriages," includes *stage coaches* used for the conveyance of the mail, or of passengers.

ASSUMPSIT for tolls accrued to the plaintiffs against the defendants for running divers coaches, chariots, and other four wheeled pleasure carriages, upon their turnpike road, through the gates, etc. Plea non-assumpsit. Reserved in Hamilton. It was conceded that the defendants, Neil, Moore & Co. run their daily lines of passenger and mail stages upon the turnpike of the plaintiffs, and were charged with the highest tolls assessed upon coaches, or four wheeled pleasure carriages, with four horses. The plaintiffs' right to recover depends upon the construction of their charter. The Act of Incorporation fixes the rate of toll "for every four wheeled carriage or wagon drawn

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Cincinnati, Lebanon, and Springfield Turnpike Co. v. Neil and others.

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by one horse or ox, at eighteen and three quarter cents; for every horse or ox in addition six and a quarter cents, etc., and for every coach, chariot, or other four wheeled *pleasure carriage* drawn by one horse, driver included, twenty five cents; for every additional horse twelve and a half cents," 26 L. O. L. 149. If the defendants' stages are within the latter rate of toll, the plaintiffs have a right to recover.

[12] \*FRAZER, for the plaintiffs, contended that the defendants' stages were coaches, within the fair meaning of the word, and cited Encyclopedia Americana, Reese's and Perry's Cyclopedias, and Johns. Dict. Coach. The charter declares all coaches and chariots *pleasure carriages*, and subjects all other four wheeled *pleasure carriages* to the same toll. By including the drivers of such carriages this is clearly shown. But whether the defendants' carriages are coaches or not, they are described in the general name of four wheeled *pleasure carriages*. They have all the requisites of *pleasure carriages*. They are hung on springs, have a close varnished body, with curtains, and cushioned seats. They carry passengers by the poll, not by weight. It is the style, etc., of the carriage that fixes the rate of toll, and the fact that passengers in stage coaches generally travel upon business, and not for mere pleasure, can make no difference.

STOREE and FOX, for the defendants, insisted that a stage was neither a *pleasure carriage* or *pleasure coach*. The Legislature intended to describe as *pleasure carriages* or coaches, only such carriages as were *used for pleasure* merely. A stage coach is as much a *business carriage* as the wagon in which merchandize is carried. The body of the *mail coach* is filled with mail bags, and only two or three passengers are taken outside; can such *mail carriage* be considered a *pleasure carriage* or coach? The common use of the carriage determines its character.

By the Court, WOOD, Judge. It is conceded that the defendants' stages, or stage coaches, daily pass over the plaintiffs' road, carrying the mail or passengers, and the only question is whether they are subject to pay toll as coaches or *pleasure carriages*, as described in the act incorporating the plaintiffs? It seems to a majority of the Court, that a correct construction of the act, will bring the defendants' stage coaches within its provisions. Coach is a generic term. It is a kind of carriage, and is distinguished from other vehicles chiefly, as being a covered box, hung on leathers, with four wheels, 3 Enc. Amer. 271,

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Cincinnati, Lebanon, and Springfield Turnpike Co. v. Neil and others.

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tit. coach. A very large kind of coaches called *omnibus*, has lately come into use, which serve to carry passengers, newspapers, and furniture, *ib.* 272. Here an omnibus is called a coach, though not used for pleasure, but for the *common* transportation of persons and baggage. Johnson defines a *mail coach*, a coach that carries the mail, and a *stage coach*, a coach that regularly carries passengers from town to town. Each is called a coach. It is \*contended that the word [13 *other*, in the clause of the act describing these vehicles, refers to coach as well as chariot, and that the substantive chariot, used in the sentence adjectively, qualifies coach, and carries with it the signification of *pleasure coach*. We do not so understand it. Coach forms a distinct member of the sentence; chariot then intervenes; and this Johnson defines a *half coach* with four wheels, used for convenience and pleasure. Then follow the words *other four wheeled pleasure carriage*; and chariot and carriage are coupled directly by the disjunctive *or*, intended to comprehend all pleasure carriages, other than chariots, but having no relation to coaches. We would not oppose the mere grammatical construction of a sentence, to the obvious meaning of the legislature; but both concur here. A *mail coach* and a *stage coach*, are nevertheless *coaches*. A coach is the description in the act. The defendants' coaches are run on the road with the mail and with passengers, and must pay the toll assessed upon coaches.

LANE, C. J. dissented. The statute imposes a toll upon all four wheel carriages, but levies a higher toll upon "coaches, chariots, and other pleasure carriages;" thus making a distinction between those devoted to industrial purposes, and those whose uses are more or less objects of luxury, and intending to favor the former, by laying a heavier burden upon the latter. A stage coach is a vehicle *sui generis*, but used for business, and in no sense a "*pleasure carriage*," notwithstanding its ambitious name. I therefore think, that by the spirit and intention of the law, it should not be subjected to the higher rate of toll.

Cause remanded for inquiry of damages.

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Hopkins v. Kent.

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**BENJAMIN F. HOPKINS v. ZENAS KENT.**

Where a deed describes a line of the land conveyed, by a line running to the *Cuyahoga River, at low water mark*, thence up the river at low water mark, etc., held that it did not pass title to the land within the bed of the river.

Where a deed conveys a tract of land lying on both sides of the Cuyahoga River, with all the waters and water courses thereto belonging: reserving nevertheless [to the grantor] seven acres on the east side of the Cuyahoga River where the bridge crosses. *Quere*, Does the whole bed of the river pass by the deed, or is the land to the middle of the stream reserved?

TRESPASS on the Case, for a nuisance in overflowing the plaintiff's land. From Portage. At the trial of the issue of not guilty to a [14] jury, \*both parties claimed title to the land overflowed, derived from Frederick, George, and John Haymaker. In September, 1825, the Haymakers by deed conveyed lot No. 25, with other lands, to Jacob Reed, with all the waters and water courses thereto belonging, "Reserving [to themselves] nevertheless seven acres of land off the northeast corner of lot 25, on the east side of the Cuyahoga River, where the bridge crosses said river." This title is in the defendant as fully as Reed held it. In October, 1815, the Supreme Court in Chancery decreed the Haymakers to convey to one Quinby the title to the said reserved seven acres, by the following description: "A piece of ground adjoining and lying on the east side of the Cuyahoga River, beginning at the north-east corner of the bridge, thence along the north side of the state road eastwardly to the north and south line on the east side of lot twenty-five, thence north to the north-east corner of said lot, thence west to the Cuyahoga River, thence south to the place of beginning." This land was conveyed to the plaintiff by deed in September, 1832, and described as "part of lot 25, beginning at the north-east corner, then south by the east line of the lot 13 chains 87 links to a post, thence west 3 chains and 60 links to the Cuyahoga River at low water mark, intersecting said river 9 links north of a hemlock tree, thence up said river, at low water mark to the north line of the lot, thence east to the place of beginning." Upon this state of title being shown, the court expressed the opinion that the plaintiff's deed did not cover the land within the bed of the Cuyahoga River below low water mark, whereupon a juror was withdrawn and a nonsuit ordered. The court is now called to review that opinion upon a motion to set aside the nonsuit and for a new trial.

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Hopkins v. Kent.

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L. V. BIERCE, and R. P. SPALDING, for the plaintiff, insisted that the whole question turned upon the construction of the deed from Haymakers to Reed. Did that grant pass to Reed the exclusive use of the river? He deeded 1050 acres on the *west side* of the river, *with the water power upon it*, and reserved seven acres on the *east side* with the water power upon that. The grant and reservation stand in the same situation, each having an equal right to the river flowing between the tract conveyed and that reserved. The plaintiff, therefore, owns to the middle of the river, and the defendant is liable for overflowing his fall. The case in 3 Ohio 495, is conclusive of this; a boundary upon the river, passes the land to the middle of it. The reservation in this case, calls for the *east side* of the river, and, of course, bounds by, and passes the land to the middle. The decisions \*in Con- [15]necticut go even farther. The phraseology of the decree of the Court, beginning for the land at the *corner of the bridge*, and, running round the tract, *to the river, etc.*, does not change the question. It evidently described that point, as the beginning, where the bridge intersected the bank of the river.

E. WHITTLESEY, NEWTON, and TURNER, for the defendant, submitted no argument.

By the Court, LANE, C. J. The decree and conveyances under which the defendant claims to the middle of the river, do not *profess* to convey the bed of the stream. Describing the land as adjoining, as lying on the east side of the river, and running the line to the river, would, in the absence of other evidence, imply an extension to the middle of the stream; but the equivocal language used, coupled with the previous conveyance to Reed of "*all waters and water courses*," would go far to prove that the bed of the river was not included. This presumption is confirmed by the construction which the owners of the small tract have since given to the extent of their title. The conveyances down to the plaintiff, describe it as part of lot No. 25, beginning at the north-east corner, thence south by the east line of the lot, etc., thence west three chains sixty links to the Cuyahoga River *at low water mark*, thence up said river, *at low water mark*, to the north line of the lot, thence east. Here the bed of the river is excluded in terms, so that even if it did not furnish satisfactory evidence, that the title to the middle of the river was not vested in Quinby by the decree, it fully concludes the plaintiff, by showing that he acquired no rights below low water mark.

New trial refused.



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St. Clair v. Morris

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## FRANCIS H. ST. CLAIR v. WILLIAM R. MORRIS.

Where the wife joins her husband in a mortgage containing a renunciation of dower, a sale of the land by the administrator of the husband for the payment of his debts extinguishes the right of dower, and transfers an unincumbered title to the purchaser.

BILL IN CHANCERY, claiming dower in lot 101 in Benham's subdivision of Cincinnati, part of out lot 34, of which the late Arthur St. Clair, the plaintiff's husband was seized in fee during coverture. Reserved in Hamilton county. The answer alleges, that the plaintiff, [16] in \*March, 1820, joined with her husband in mortgaging the whole of out lot 34, to the Cincinnati College, to secure the payment of four thousand dollars, in ten years, with annual interest, which was afterwards assigned to the Bank of the United States. That in February, 1822, St. Clair's administrator petitioned the Court of Common Pleas for leave to sell all his intestate's real estate in Hamilton County, including out lot 34, to pay debts. The court ordered an appraisal of the land, and the assignment of dower to the plaintiff. Dower was assigned in all but out lot 34, as to which the appraisers reported the dower had passed in the mortgage to the College. A sale was ordered, and the out lot was sold for nine hundred dollars free of dower. These proceedings were approved by the Court. The mortgage is uncanceled. The facts set up in the answer were proven in the case.

J. C. WRIGHT, T. WALKER, and H. HALL, for plaintiff, contended that dower never was assigned in 34: the commissioners were mistaken in supposing a release of dower by a femme covert in a mortgage, was the same as such release in an absolute deed. Had Mrs. St. Clair been a party to the proceedings and objected, there is little doubt the assignment of dower in this respect would have been corrected. The confirmation of the proceedings by the court only operated upon the dower actually assigned. The right of dower is highly favored by equity. In *M'Farland v. Febiger*, 7 Ohio 194, this court went to the very verge of injustice in order to sustain it. The widow's *tabulum in infragio* is to be saved if possible. Had the mortgage been paid off without legal proceedings, there can be no doubt the dower would have remained. The equity of redemption can only be extinguished by foreclosure, where the widow is a party. In these proceedings she was no party, had no day in court, and can not be

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concluded. Her claim has precedence over the debts of her husband. When a mortgage debt is paid, no matter how, the mortgage is extinguished. The effect of the administrator's sale, and the payment of the mortgage debt, extinguished the mortgage, and restored the right of dower.

W. R. MORRIS in person, contended that these proceedings barred the dower, certainly to the extent of the incumbrance, although either the widow or heir had a right to redeem. If the widow redeemed she might claim dower of the whole, and hold the mortgage lien on the remainder of the estate. 5 Johns. 452, 482, 497; \*1 Johns. Ch. [17 45; 4 Kent. C, 45, 46. The sale by the administrator free of dower for less than the mortgage debt, left nothing for the plaintiff to be endowed of. The sale by the administrator is the same in effect upon the widow's interest, as if the premises had been sold under a decree in Chancery to pay the debt, and passed the whole estate. A widow is not endowed in this state of a mere equity of redemption. 29 O L. 249; 1 Ch. St 472; 4 Kent. C. 40.

By the Court, GRIMKE, J. The position taken by the counsel for the plaintiff is, that when the mortgage money is paid, no matter how, the mortgage is extinguished, for the debt is the principal and the mortgage only the incident; that the effect of the sale by the administrator, was to extinguish the mortgage, and by so doing to revive the right of dower. But this position can hardly be true to the extent to which it is attempted to carry it; for if a bill had been filed to foreclose this mortgage, it is very certain that the purchaser under the decree, would have taken a title discharged of the encumbrance of dower. The debt would have been paid, and yet the right of dower would not have been revived, but would have been extinguished together with the debt. The language, the debt is the principal and the land only the incident, which was first attributed to Lord Mansfield in 2 Burr. 978, is calculated to mislead, for it never was true in the universality with which it is thus stated. A mortgage in fee, as this is, is in reality a fee simple conditional, which is as large and ample an estate, as a fee simple absolute, though it may not be so durable, Co. Lit. 18 a., and a transfer of such an estate can not be effected by the mere assignment of the debt. All the cases, when strictly examined, are reconcilable with this view. If the mortgagee's estate in the land is the same thing as the money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently

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there would be no difference between the mortgage of land for a term only, and a mortgage of it in fee. The land is the incident in one sense, because it is uncertain whether it will be necessary to resort to it as a fund for the discharge of the debt. If it is, then it ceases any longer to be the incident. By the same process by which the debt is discharged, the right to the land is also transferred. Mrs. St. Clair, by joining with her husband in the deed of mortgage, barred herself of dower in express terms, so far as the mortgagee and his assigns, and all persons claiming under them, are concerned. The only difference between a renunciation of dower in a deed in fee simple, and a deed of [18] mortgage is, that in the former case, the right of dower is *ipso facto* extinguished, and in the latter it is dependent upon some future event, whether it shall be so or not. But that it may be, is most certain; otherwise there would be no meaning or utility in a relinquishment of dower. He who takes a conveyance in fee, in which is contained a relinquishment of dower, is a purchaser of the right of dower; and he who takes a mortgage to secure a debt, is also a purchaser of the right of dower, if it shall be necessary to the satisfaction of the debt; if it were otherwise, the mortgagee and the purchaser, under a judicial sale, would be in the same predicament as if the deed had been executed by the husband alone.

The act under which this sale was made, 2 Ch. St. 929, like the one now in force, authorizes the administrator, where the personal property is insufficient to pay the debts, to sell the land for that purpose. But even admitting that the sale of the entire interest in the land was irregular, yet I do not see how it can be now cured. The proceedings of a court of probate are strictly in rem and not in personam. If it has jurisdiction, its acts are binding as against all the world. But there was no irregularity in this case. The proceeding was justified by the law, and was indispensable to carry out the provision regarding the estate of intestates. The 35th section of the act directs the administrator to make a deed for the land, which shall vest in the purchaser as complete a title as if the deed had been made by the intestate in his lifetime. And admitting that this will have reference in this instance to some period in the lifetime of Arthur St. Clair, *after he had executed the mortgage*, then the deed would, at any rate, transfer the whole equity of redemption, freed from the encumbrance of dower. This is on the supposition that the administrator had no right to sell any thing but the equity of redemption, and yet in that case the effect of the sale would be to extinguish the right of dower. But the power

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of the administrator was broader than this. A creditor, other than the mortgagee, can only sell the equity of redemption, because, *as to him*, it is the only interest in the land which the mortgagor has. But the mortgagee may, for the satisfaction of the mortgage debt, cause the entire interest in the land to be sold. The proceeding by foreclosure, which now exists, and that by *scire facies*, which formerly existed, shows this. Now, an administrator, acting on behalf of creditors by mortgages, may do the same. As the agent of the intestate's estate, and of all the creditors also, his power necessarily reached to the equity of redemption which belonged to the intestate, and to the mortgage estate which belongs to the mortgage creditor. In other words, the power of the Probate Court to direct a sale of the land [19] was concurrent with the power of a Court of Equity to decree a foreclosure and sale. Very great inconvenience would be the consequence if this were not the case. The administrator is directed to settle up the estate, the personal property may be insufficient to pay the debts, the only real property which an intestate may have left, may have been encumbered by a mortgage, there may be a residuum after the payment of that debt, which may be wanting to pay other creditors, and the only just and regular mode of proceeding would be to sell the land and to distribute the proceeds among the creditors according to the priority of their claims. In the present instance, the proceeds were not near sufficient to discharge the mortgage debt. The petitioner, therefore, has no equity, and the bill must be dismissed.

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 LESSEE OF F. M. STALL v. O. & E. MACALESTER.

In a sale by a Guardian under an order of Court, the Guardian's deed conveys title, without a return of the sale to the Court, or an order confirming the sale and for a deed.

Sheriffs, Administrators, and Guardians making public sale of lands, may in their discretion, divide a tract levied upon and appraised entire, and sell in parcels, being responsible for the abuse of that discretion.

**EJECTMENT** for an undivided tenth part of a piece of ground about 54 feet front, part of lots 101 and 102, on the north side of Front Street, in Cincinnati. From Hamilton. Upon the trial to the jury, it was admitted that John Stall died in 1810, seized of the whole of

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the premises described in the plaintiff's declaration, leaving five heirs, of whom George W. Stall was one. George W. Stall died in 1816, leaving two children, Frances Mary, and Edward, to whom his interest in the premises descended. Of these two children, the lessor of the plaintiff is one.

The defendant then offered in evidence a transcript of record from the Court of Common Pleas of Hamilton County, which was objected to by the plaintiff, but the objection overruled by the Court. From this transcript it appeared, that at the November term of the Court of Common Pleas, 1829, William Disney, as guardian to Frances Mary and Edward Stall, applied, under the statute, for an order to sell their interest in the premises. An order of appraisement was made, and on the 2d day of April, 1830, the land was appraised, and the appraisal returned and approved by the Court, and a sale ordered. The land was appraised at six hundred dollars. On the 8th of April 20] aforesaid, \*an order under the seal of the court was issued to the guardian directing him to sell the premises.

The defendants further offered in evidence two deeds, dated July 15, 1830, made by the guardian to different persons, under whom the defendants claim titles, for the undivided fifth part of the east half and of the west half of the premises, the west half of said premises having been sold for six hundred and twenty, and the east half for six hundred and twelve dollars. Said deeds recited the order of sale made by the court, but did not state the time and place of sale, nor how many times the notice of sale had been published, but did state that the sales were made at public vendue, legally had and notified. For these reasons the plaintiff objected to these deeds as evidence, but the objection was overruled.

The plaintiff then offered to prove by witnesses that the notice of sale was advertised only four weeks, but this evidence was rejected by the court.

It did not appear, from any evidence, that any return of the sale was made to the court, or that the same was ever approved.

The jury, under the instruction of the court, returned a verdict for the defendants, whereupon the plaintiff moved for a new trial, on the ground that the court erred in admitting the defendants' evidence, and that the verdict was against law and evidence.

VAN MATRE, in support of the motion, insisted that the transcript of record and deeds, offered in evidence, did not show title in the defendants, because 1st, no return of the sale of the premises was made

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to the court for its approval, nor was any deed ordered. 2d. The court erred in rejecting the evidence offered by the plaintiff, to prove that the notice of sale had been published but four consecutive weeks. 3d. The land having been appraised as one single parcel, and a sale ordered accordingly, it was not legal for the guardian to sell in two separate parcels. 4th. It was improper for the court or the appraisers, to take into consideration improvements made by the defendants, upon the premises, previous to the appraisal and order of sale.

W. R. MORRIS, for the defendants, cited the following authorities: 4 Ohio, 129; 3 Ohio, 553; 4 Wheat, 503; 3 Ohio, 187; Wright, 458.

By the Court, HITCHCOCK, Judge: There is no controversy in the present case, but that the plaintiff is entitled to recover, unless the \*evidence offered by the defendants prove a superior right in [21] them, and whether such is the fact depends upon the validity of the sale made by the guardian, in pursuance of the order of the Court of Common Pleas of Hamilton County, of the 2d of April, 1830. The legality of this sale has been objected to for several reasons, which will be considered in the order in which they are presented by counsel. Before doing this, however, it may be proper to remark, that with the exception of one particular, there is no pretence but that the provisions of the law upon the subject, were literally complied with up to the time of the issuing of the order of sale.

The first exception to the title of the defendants, is, that no return of sale was made to the court for its approval, nor were deeds ordered by the court to be made. If this exception is well taken, if such return was necessary, then the defendants' title is defective, and a new trial must be awarded; for, since the enactment of the law requiring confirmation by the court of a sheriff's sale, it has been uniformly held, that without such confirmation, a sheriff's deed would be void. And since the act of February 11, 1828, amendatory to "the act defining the duties of executors and administrators," 3 Chase St. 1601, it is presumed that the same rule would be applied to deeds made by executors or administrators. The sale in the case under consideration, was made under the law "for the appointment of guardians," of the 6th of February, 1824. 2 Ch. St. 1317. This act, in the third section, prescribes, that in the sale of real estate by guardians, they shall be "governed therein by the same regulations as are required of administrators in the sale of real property in the case of insolvents' estates." The reason for this reference may be found in the fact, that

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from the year 1808 up to the time of the enactment of this law, the duties of executors and administrators, and of guardians of infants, have been prescribed in the same statutes; but at the session of the general assembly of 1823-4, they were separated, and have been so continued ever since. In consequence of this reference we must look to the then existing law, regulating the duties of executors and administrators in the sale of real estates, in order to ascertain the duties of guardians in disposing of the same description of property. The act in force upon this subject at the time of the passage of the law for the "appointment of guardians," was the act of January 25, 1816, for the proving and recording wills and codicils, defining the duties of executors," etc. 2 Ch. St. 929. By this act it is provided that before the sale of the real estates of decedents, their executors or administrators, shall make application to the Court of Common \*Pleas, showing the necessity of such sale, and the court are required, upon being satisfied that the sale is necessary, to appoint appraisers. These appraisers are to appraise the property under oath, and make return to the court. And upon such return it is made the duty of the court to direct the sale of so much of the property as may be necessary. It is then made the duty of the executor, after having given notice, as in the law required, to sell at public vendue, so much of the estate as may have been ordered by the court, but it is not required that any return of this sale shall be made to the court, nor does it seem to have been contemplated that there should be any further action of the court upon the subject. These provisions became a part of the law for the appointment of guardians, as fully as if they had been repeated verbatim in that law, and by them guardians must be governed so long as the act of the 11th of February, 1824, remains unaltered or un repealed.

On the 11th of February, 1828, in an act amendatory to the act regulating the duties of executors and administrators, provision is made that after sale of real estate by these officers, return shall be made to the court for confirmation, thereby placing these sales in this respect upon the same footing as sales by sheriffs. It is insisted by the plaintiff's counsel, that this change in the law prescribing the duties of administrators shall be so construed as to effect a similar change in the law relative to the duties of guardians. Such, however, is not the opinion of the court. As has been already remarked, the law for the appointment of guardians, does not in itself prescribe the mode in which real estate shall be sold, but refers to another law upon a

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different subject as to this mode. And as has been already shown by this reference, the law referred to becomes a part of this law for this particular purpose. Such being the case, a repeal of the law referred to would not divest guardians of the right to sell in a proper case. Nor can any change in the law relative to the duties of administrators, effect a change in the law relative to the duties of guardians, unless this latter is expressly referred to. 3 Ohio, 556. On full consideration, we are of opinion that the law does not require that a guardian shall make return to the court of a sale by him made, of the real estate of his ward, nor is a confirmation of such sale by the court necessary to its validity.

The next exception to the title of the defendants is, that it does not appear that notice of sale was given as required by law, or rather that the court rejected evidence offered by the plaintiff to prove that \*the notice of sale was published only for four consecutive [23 weeks, when it should have been published six.

The law of 1816 required executors and administrators to give notice of the time and place of sale of the real estate of a decedent, by advertising the same in at least five public places in the county, and in some newspaper of the most general circulation within the county, for at least six weeks successively. The object in requiring this notice undoubtedly was, that there might be competition at the sale, and the best possible price secured for the land. That this object was effected in the present case, may well be inferred, when it is considered that the land was sold for more than double its appraised value. But if it be indispensably necessary to the validity of the title of a purchaser at guardian's sale, that strict legal notice shall have been given of such sale, then the evidence offered by the plaintiff should have been received. There can be no doubt that it is a duty incumbent upon a guardian, to give notice strictly according to law; and should he fail to do it, and should his ward in consequence sustain loss, he might be made liable for such loss. But the question is as to the effect of such failure upon the title of an individual who has, in good faith, purchased at the sale, and received a deed consequent upon such purchase.

So long as real estate is sold by sheriffs in satisfaction of judgments, by executors or administrators for the payment of the debts of decedents, or by guardians for the sustenance of their wards, sound policy dictates that such sales should be sustained as far as they can be consistently with the principles of law. Every inducement should be



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held forth to encourage purchasers to give the full value of what they buy. And nothing can have a stronger tendency to this effect, than to sustain sales, notwithstanding trifling irregularities. It is said by the Supreme Court of the United States, in the case of *Wheaton v. Sexton*, 4 Wheat. 503, that the purchaser at sheriff's sale "depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal," or sheriff. This principle was recognized in this court in the case of *Lessee of Allen v. Parrish*, 3 Ohio, 187. In this latter case it was held that the purchaser at sheriff's sale took a good title, although the property had not been appraised. And the Judge delivering the opinion of the court, says, "it has never been supposed, that it was essentially necessary to sustain a title under a sheriff's deed, to show that the sale of the land was advertised the length of time and in the manner 24] directed by the statute." Such we understand to have been \*the law in this state previous to the act requiring sheriffs' sales to be confirmed by the court, before a deed can be executed. And since this principle was introduced into the statute, we do not feel ourselves authorized to go behind the act of confirmation, in inquiring into the validity of sheriffs' sales.

In the case of *Ludlow's heirs v. Johnson*, 3 Ohio, 553, this court say, "there is no good reason why those who purchase from an administrator, should not be viewed with the same favorable eye with those who purchase from sheriffs." If this position be correct, and we think it is, then it follows that the title of a purchaser at an administrator's sale will be sustained, although the legal notice may not have been given; and the same protection must be given to those who have purchased at a guardian's sale. The court then did not err in rejecting the evidence offered by the plaintiff, because, had that evidence been received, it would have made no difference in the final result of the case.

The next objection to the defendants' title is, that the land having been appraised as one entire parcel, was sold in two separate parcels.

We do not see that there was any thing improper in this. In sales of land by sheriff, administrator, or guardian, the individual making the sale must exercise his own discretion whether the property shall be sold together or in separate parcels. The first object should be to sell in such a manner as to secure the greatest price. If this object can be effected by offering the property in parcels, the officer selling would be censurable did he not divide it. In all cases he must exercise

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a sound discretion, having reference to the interests of all concerned, and being responsible for every abuse of discretion. It is not pretended in the case before the court, that any one was injured by the course adopted by the guardian; at least it is not pretended that his wards were injured. The entire property was appraised at six hundred dollars; it was sold in parcels at twelve hundred and thirty-two.

The next and last objection to the defendants' title is, that the appraisal was made with reference to certain improvements made upon the land by the defendants previous to the order of appraisal, which it is claimed was improper.

Upon an examination of the transcript of record given in evidence, it is apparent that the additional value of the land, in consequence of these improvements, was not included by the appraisers in their estimate of the value. In his petition to the Court of Common Pleas, praying for an order of sale, the guardian represented that the present \*defendants were in possession of the land under a contract of [25 purchase with Jeremiah Brown and Mordecai Lewis, who claimed title to the same, which contract was made in 1827. That the defendants had made large and valuable improvements, with his knowledge, and he submitted to the court whether the land should be appraised with reference to these improvements put upon it by the defendants, or in reference to its situation in 1827. The court ordered that the land should be appraised in reference to the improvements that were upon it in 1827, which was done accordingly.

It is not perceived that there is any thing improper in this. There is certainly nothing inequitable or unjust. If the land had not been sold by the guardian, and an ejectment had been brought by his wards, to recover the possession, they could not have had the benefit of these improvements, but their value would have been secured to the defendants under the occupying claimant law. But admitting that this was an irregularity, it can not have the effect to defeat the defendants' title. There is an order of sale, and so long as this remains in force the purchaser must be protected.

The motion for a new trial is overruled. Judgment on the verdict for defendants.

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 Smith v. Comm'rs of Portage Co.
 

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**WARREN H. SMITH v. COMMISSIONERS OF PORTAGE COUNTY.**

Instructions given by a prosecuting attorney to constable having a warrant from a justice of the peace, to arrest a person accused of crime, do not bind the county to pay for the constable's services and expenses.

A constable, in serving a warrant to arrest a person accused of crime, *out of the State*, violates both public and private right, and such service is no consideration upon which a promise to pay can be implied.

A constable entitled to fee, for pursuing a fugitive from justice, under a justice's warrant, must procure a transcript of the justice's proceedings with a bill of fees, and present to the county auditor, and if the auditor refuse, in a proper case, to give an order for the fees due, he may be compelled by *mandamus*, but his refusal to audit the account will not raise an implied promise by the county to pay.

It is no part of the legal duty of a prosecuting attorney to attend to prosecutions in behalf of the state before justices of the peace: his duties are confined to the Courts of Common Pleas and the Supreme Court.

**ERROR to the Common Pleas of Portage.** Smith brought assumpsit against the commissioners in the court below, and declared in the common counts for work and labor, money paid, etc. The case was tried to a jury upon non assumpsit, and a verdict and judgment **26]** \*rendered for the defendants. A bill of exceptions presents the following state of case upon the record. A warrant duly issued by a magistrate of the county to arrest one William Latta, for having in possession plates for printing false and forged bank notes, was placed in the hands of Smith, who was a constable, for execution, and Bierce, the prosecuting attorney of the county, instructed him to pursue Latta into the State of Indiana, his place of residence, or wherever he might be found, and arrest him. In pursuance of which, Smith pursued Latta into Indiana, and arrested him, but was obliged to leave him and return for the requisition of the Governor of Ohio. This was afterwards procured and Latta brought to the county. Smith presented his bill for these services and his expenses, to the county auditor and to the commissioners, who refused to audit or pay his account. No transcript of the proceedings containing a bill of the costs had been furnished either by the magistrate or other person.

Upon this state of fact the counsel for plaintiff prayed the court to instruct the jury, that the plaintiff was entitled to recover for these services, as performed under the directions of the prosecuting attorney;

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or at all events, that he might recover for his services under the warrant *within the State of Ohio*, which the court refused. The court then, at the instance of the counsel for the defendants, instructed the jury, that the warrant conferred upon the plaintiff no authority to go into the State of Indiana, and that the prosecuting attorney had no authority to bind the county by his instructions. This charge and refusal was accepted to by the plaintiff and for alleged error therein, he now seeks to reverse the judgment.

BIERCE, for the plaintiff, urged, as a general rule, that an attorney has power to bind his principal so far as may be necessary to effect the object of his employment, especially if the principal assents to and receives the benefit of his acts. In this case the service was performed for the county, under the direction of the county attorney. The arrest was made in consequence, and the prisoner secured, so as to be afterwards obtained under the governor's requisition as a fugitive from justice, and delivered over to the county authorities. The governor ratified the service of Smith in arresting Latta, by requiring his delivery, and the county authorities by receiving and holding him for trial. The county having thus legalized Smith's acts, and received the benefit of his services, can not now disavow those services and refuse payment. At all events, the plaintiff must recover for service within the state. The warrant directed him to pursue Latta \**"into [27* any other county within the state," and he was bound to obey, whether instructed by the county attorney or not. The omission to procure a transcript of the proceedings can make no difference, as that was not required by the defendants' counsel.

SLOANE and OTIS, for the defendants, contended, that the act creating the office of prosecuting attorney, simply makes it his duty to conduct suits for the state, but does not confer upon him any power to make contracts to bind the county; and such power is not *necessary* to the discharge of his official duties. 1 Dana, 447; 31 O. L. 13; 1 Ch. St. 359, 453, 561, 723-4; 29 O. L. 413.

A county is a mere *quasi* corporation, and can only contract by its commissioners. 29 O. L. 268; 2 Ohio, 352; 3 Ind. 501. The commissioners can not be made liable upon the common counts in *assumpsit*. 5 Ohio, 27; 8 Am C. L. 526-7; 2 Stark Ev. 53. These services were not performed under the act authorizing the pursuit of fugitives from justice; but if they were, the act confers power upon the auditor to pay only upon the presentation of a transcript of the proceedings. A bill of fees is no such transcript.

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By the Court, Wood, Judge. It is contended that the defendants are liable in this suit, inasmuch as an attorney, as a general rule, has authority to bind his principal so far as necessary to fulfill his employment, and as the services of the plaintiff were performed under the direction of the defendants' attorney, for their benefit, and in the due performance of his duty, they constitute a legal consideration upon which the law raises a promise to pay. To this it may well be answered, that whatever moral obligation rests upon the prosecuting attorney, to prosecute offenses *before justices of the peace*, the law makes it no part of his duty to do so. The act, 31 O. L. 13, provides that it shall be his duty "to prosecute for and on behalf of the state, all complaints, suits, or controversies in which the state shall be a party, within the county for which he shall have been elected, *both in the Supreme Court and in the Court of Common Pleas.*" It thus appears that the duty of the county attorney is confined to the Supreme Court and the Court of Common Pleas, and his appearance in an inferior court is a *mere voluntary act*, for which the county is not liable unless by express contract.

But it is said, the county is liable for the constable's costs *while traveling with his warrant in the state*. Without admitting this position in the case at bar, in which the warrant was confessedly issued **28]** \*against a citizen of another state, with no intention or purpose of its execution in Ohio, no legal or moral obligation required the constable to attempt its execution in Indiana, and an arrest made upon it there was a violation of both public and private right. Services rendered under such circumstances, are both voluntary and without authority of law, and present no legal foundation for an implied promise to pay for them. There is, however, a still more satisfactory objection to the defendants' liability in this case. The statute provides, that when a constable is entitled to fees, it shall be the duty of the justice to make out and deliver to him, a transcript of the proceedings containing a bill of the constable's costs, which the constable shall present to the county auditor, who shall examine the same, correct the errors, if any, in the charges, and draw on the treasurer for the amount allowed in favor of the constable. 29 O. L. 198-9. When the constable presents his transcript to the auditor, if he refuses to perform the duties enjoined upon him by law, he may be compelled by *mandamus*. Such remedy is plain and adequate; but the auditor's refusal to perform his duty, does not, in our opinion, subject the commissioners to liability.

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Stratton v. Sabin and Others.

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We think, therefore, there is no error in the proceedings and judgment of the court of Common Pleas, and affirm the judgment with costs.

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## DAVID STRATTON v. WARREN SABIN AND OTHERS.

A stipulation in a deed of conveyance, giving the grantor the privilege of selling the land conveyed, if he could do so to better advantage within two years, he, in that event, paying back to the grantor the purchase money and interest, does not of itself constitute a mortgage.

**BILL IN CHANCERY.** From Clinton. This case, in the pleadings and proofs, involves many enquiries unnecessary to be stated to elucidate the point decided by the court. The following statement will present the facts connected with the point decided. In 1822 Sabin then owning a tract of about seventy acres of land in Clinton county, united with his wife in a conveyance of fifty acres of it to the defendant, David M'Millan. The deed contained the following clause: "And it is expressly understood that if the said Sabin can, within two years from the date hereof, dispose of the said fifty acres hereby granted, to any better advantage to himself, he shall have the privilege of so doing, by paying the said M'Millan the consideration money herein mentioned, viz. three hundred dollars and interest."

\*In 1834, the Urbana Banking Company obtained a judgment [29 against Sabin in the common pleas of Logan county. Execution was sent to Clinton county, which was levied upon seventy acres of land, including the fifty conveyed to M'Millan, which was duly sold to the plaintiff. The proceedings were confirmed by the court and a deed made. After the levy, Sabin sold forty acres, part of the fifty acre tract, to defendant, William Hibben, and received a deed from M'Millan. Hibben paid M'Millan's assignee the balance claimed by him, and the residue of his purchase he paid to Sabin, and obtained the possession of the land. Stratton claims that the deed to M'Millan was a mortgage, which was quite or nearly paid off when his levy was made, and that Sabin was a mortgagor in possession, and had a legal estate which passed by the sale on execution; that the transfer to Hibben was fraudulent and taken with full knowledge of the levy, &c., and prays account of the sum due on the mortgage, to be let in to redeem, &c.

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G. FOOS and G. J. SMITH, for plaintiff, insisted that the deed of Sabin and wife to M'Millan was a mortgage only, given to secure the payment of money, treated as such by the parties, and containing on its face a condition of defeasance. They cited *Strong v. Stewart*, 4 Johns. Ch. 166; 1 Day's Cases in E. 139; 1 Pow. on Mort. 4 Lond. Ed. 104; *Walker v. Walker*, 2 Atk. 99; *Young v. Peachy*, ib. 257. Chancellor Kent, in *Henry v. Davis*, 7 Johns. Ch. 41, says, "that every contract for the security of money, or a debt, by the conveyance of real estate, is a mortgage, and that all agreements of the parties, tending to alter in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void." This doctrine has been recognized in Ohio, *Miami ex. Co. v. Bk. U. S. et al*, Wright, 252-3, and the authorities there referred to. See also 4 Am. Ed. Fonb. Eq. 494, note, where the authorities are collected. Conditional deeds are not favored, and where there is any doubt, the court will determine the deed a mortgage. *Conway v. Alexander*, 7 Cranch, 218. It is one distinctive characteristic of a mortgage, that there is a mutual remedy between the mortgagor and mortgagee, but this never exists where the deed is purely conditional. 1 Mad. Ch. 515 to 519. The assignment of the mortgage debt by M'Millan to M'Cormick, and the discharge of it by Hibben at the request of Sabin, extinguished the debt, and operated a release of the mortgage to 30] Sabin. 1 Johns. Ch. 589; 2 Gal. 152; *Coxe Dig.* 493; \*2 Marsh. 109; *Green v. Hart*, 1 Johns. 582; *Teirnan v. Beam* and others, 2 Ohio, 383.

R. B. HARLAN, for the defendants, contended that the deed to M'Millan was clearly not a mortgage. There is no stipulation in it for the payment of money or the doing of any other act, nor proviso making it void upon the happening of any event. It merely purports to give Sabin a *privilege* of repurchasing, but in no way imposes upon him an *obligation* to do so, or to repay, which could be enforced, and so M'Millan was by the deed left without the remedies of a mortgagee. 7 Cranch, 218, 225; 1 Mad. Ch. 517; 4 Mass. 456; 12 Mass. 456; 1 Wash. 125; 1 N. H. 39. If the deed was not a mortgage on its face, as to Hibben it can not be held one, because he purchased without notice. 3 Wend, 208. If the deed was not a mortgage, then Sabin's right passed by the deed, and inasmuch as he did not avail himself of the privilege of repurchase within the two years, it was wholly gone before the levy. 2 Yerg. 6; 2 Bibb, 224-5; 4 Kent. C. 144; 5 Bac. Ab. 626; 2 Cruise Dig. 86; 1 Mad. Ch. 517-18 *and note.*; 2

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Fonb. Eq. 262; The title of Sabin, being at best only an equitable one at the time of the levy, was not bound by it. 8 Ohio, 23-4; 1 Ohio, 314; 18 Johns. 18, 94; 9 Cow. 73; 2 Bibb, 94.; 7 Ohio, 228; 3 Ohio, 238; 6 Johns. Ch. 423. Hibben having made his contract before the sheriff's sale, has the elder equity, and will be protected here- 1 Blackf. 94; 1 Bibb, 523.

By the Court, LANE, C. J. The question on which this case turns is, whether the deed from Sabin, in 1822, was a mortgage, leaving in him the right of redemption? Because, if he had in him the interest of a mortgagor in possession, his right to redeem the mortgage passed to the purchaser at the sheriff's sale. Other objections to the sale are raised by the parties, but it is unnecessary to consider any other than this.

The deed itself is ambiguous. The sale is not absolute, but it does not necessarily imply any other interest in Sabin, than a right to repurchase, or an authority to sell. The possession continued vacant until Hibben's purchase, except some slight acts of ownership by M'Millan—the taxes were paid by him. No proof is made of any previous dealings between the parties—no note or covenant to pay money is shown. The answers both of Sabin and M'Millan, deny in the most positive terms, that the parties intended it as a mortgage, or that any debt subsisted between them; or that they designed anything else, except to secure to Sabin the privilege of repurchase. It is admitted, however, that in 1831 or 1832, a sale of this land was [31] made by M'Millan to Sabin; but the answers aver it was not under the privilege retained in the deed, which had been abandoned long before, but under an entirely new agreement. The consideration was five hundred dollars, one hundred and eighty or one hundred and eighty-five of which was paid down, and the remainder in three annual payments, secured by notes. Hinkson proves that sometime in 1833, as he believes, he drafted an agreement between Sabin and M'Millan, for the purchase of this land, the terms of which he can not recollect. This repurchase is calculated to raise doubts, but the proof of *the agreement of repurchase before* the judgment in favor of the Urbana Bank, corroborated the answer, notwithstanding the disparity in dates between the answers and deposition. There is, it is true, much in the case to awaken suspicion, but we nowhere find proof enough to establish the relation of mortgagor and mortgagee between these parties, against the direct denials of the answers.



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In the late case of *Glover v. Paine*, 19 Wend. 518, a similar question was presented, and the court held, that the mere fact of a conveyance of land, and an agreement for a reconveyance at a future day, at an advanced price, at the election of the grantor, afforded no evidence of an intention that the deed should be considered a mortgage, though the question might have arisen, had the deed been given for a pre-existing debt, or on a loan of money, or had the grantor entered into an obligation to *repay* the consideration money expressed in the deed.

Bill dismissed.

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JOHN P. FOOTE

v.

THE CITY OF CINCINNATI, DAVID GRIFFIN AND JOHN W. MASON.

Trespass quare clausum fregit will not lie against a corporation aggregate.

Where several are sued jointly for a tort, which in point of law and fact could not be joint, a demurrer is good for all.

**TRESPASS QUARE CLAUSUM FREGIT.** From Hamilton County. The plaintiff declares against the defendants jointly, for that they broke and entered his premises and pulled down and destroyed several buildings, to his damage seven thousand dollars. To this the defendants demur generally, which is joined.

J. C. WRIGHT, T. WALKER, and E. WOODRUFF, for the defendants, insist, this is a misjoinder, as a corporation can not commit a trespass with force and arms, nor be sued in trespass. They cited 8 East. 32] \*230; 1 Ch. Pl. 66; 1 Blk. Com. 503. The case of *Orr v. Bk. U. S.* and others, 1 Ohio, 37. expressly decides, that a corporation can not commit an assault and battery, nor be joined in a suit against individuals for such trespass. The authorities show the same rule, applicable to all personal injuries or those resulting from force, "for a corporation can neither beat nor be beaten in its body politic." A trespass with force supposes a direct personal agency in the act which a corporation can not exert.

B. STORER and C. FOX, for the plaintiff, made two points: 1. That trespass, *vi et armis*, can be sustained against a corporation. 2. That a corporation may be joined in such suit with individuals. They con-

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tend there is nothing in the nature or constitution of corporations which renders a remedy appropriate against individuals inapplicable to them. If a corporation can order and direct its servants to commit trespass with force, it should, like individuals, be answerable for the injury of the servant so committed. Within the scope of their corporate powers the law considers corporations as individuals, and it is in accordance with the spirit of modern decisions and the policy of the law to assimilate corporations as much as possible to individuals, to govern them by the same rules, and subject them to the same remedies. By the common law some actions of trespass are permitted against corporations. The case of *Yarboro v. Bk. of England*, 6 East. 9, and the cases there cited are precisely similar to this. It is said, to be sure, a corporation could only commit trespass by writing under seal, *Vin. Ab. K. 22*. So it was formerly held of their power to contract, but that is now done away with, and they contract as individuals. The case of *Orr v. Bk. U. S.* and others, is expressly limited to the case of assault and battery. The court say, "it is not intended, nor is it necessary, to assume the principle, that trespass will not lie in any case against a corporation, or that individuals may not be joined in the same suit with a corporation, for a tort which they may jointly commit." In a late Pennsylvania case, 4 Serg. & R. 17, the court held, that where persons employed by corporations commit injury, the corporation should "be responsible in the same manner that an individual is responsible for the act of his servant. The act of the agent is the act of the principal. There is no solid ground of distinction between contracts and torts." They cite also, 7 Cow. 484; 6 Peters, 444; Bro. Corp. 48; 7 Mass. 186; Com. Dig. Action on the case A.

The second proposition is but a corollary of the first. The old objection to the joinder because of diversity of process, has no [33] application here, as now the parties are brought into court by the same, and not a different writ, and the old rule of law, *ratione cessante*, may be here appropriately applied. The case of *Goodloe v. The City*, 5 Ohio, 513, virtually decides this case for the plaintiff.

By the Court, GRIMKE, Judge. The plaintiff in this case declares in trespass, against the city of Cincinnati and two individuals, charging them jointly with having broken and entered upon his premises and prostrated and destroyed several buildings, etc. To this is general demurrer. This is the first instance, if we except some very old cases which are alluded to in *Yarboro v. The Bank of England*. 16 East. 6.,

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in which this action has been attempted to be supported against a corporation: and to be sure, if the denial of the suit would draw after it, as a necessary consequence, the denial of any effectual remedy, that circumstance would afford a powerful argument why it should be sustained. But that consequence will not follow. Another remedy more appropriate and equally effectual will lie; and the question is, whether a form of action which presupposes the injury to have been committed with force, can be resorted to?

In *Yarboro v. The Bank of England*, it was held that trover would lie against a corporation: and certainly it is not true, as has sometimes been said, that no suit at common law can be sustained against a corporation for a tort. The case of *Argent v. Dean, etc.*, of St. Paul's, cited in 16 East. 8, note, was against a corporation for a false return to a writ of *mandamus*, and no objection was made that the action would not lie. Indeed instances are numerous of like suits without objection. *Riddle v. Proprietors of the Locks, etc.*, on the Merrimack River. 7 Mass. 186, was trespass on the case against a corporation. There it was contended that trespass would lie against a corporation; and that trespass on the case in its origin, was merely an extension of the action of trespass *vi et armis*, the old writ of trespass being applicable only in a few instances, it was attempted to enlarge its scope so as to adapt it to every new case. But notwithstanding in ancient times, the action of trespass on the case, as well as trespass proper, was laid *vi et armis*, as well as *contra pacem*, it is never so laid now. No two actions are kept more separate and distinct from each other, and therefore it was determined in the Massachusetts case, that an action on the case would lie against a corporation. The case of *The Chestnut Hill, etc., Turnpike Co. v. Rutter*, 4 Serg. & R. 6, was also an action on the case, and the judge who delivered the opinion, 34] after \*reviewing all the authorities, decided that the action was maintainable. Thus trover, case, and an action for a false return, have all been decided fit remedies against a corporation: but no instance is found, since case and trespass have ceased to be confounded with each other, of trespass *vi et armis* against a corporation aggregate. In *Orr v. Bank United States, et al*, 1 Ohio, 37, this court decided that trespass for assault and battery would not lie against a corporation; and it is difficult to perceive any material distinction between the two cases. The whole reasoning proceeds upon the inconsistency of suing a corporation in a form of action which presupposes the injury to have been committed with force and arms, and is, therefore, equally appli-

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cable to trespass upon the person and upon reality. It is true the objection may be denominated a technical one; but even a technical rule, after it has become a general one, should for that reason alone be preserved, unless manifest inconvenience would be the consequence. But here none such can result. The individual members of the corporation would be liable in their personal capacity, if the circumstances of the case would warrant it.

The only remaining question is, whether, as Mason and Griffin are joined in the suit, they may take advantage of the demurrer? The rule is, that if several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur. And it is only where, in point of fact and of law, several persons might have been guilty of the same offence, that the joinder of more persons than were liable, in a personal or mixed action, offers no objection to a partial recovery. 1 Ch. Pl. 99 Here the tort complained of could not in point of law be joint, and the demurrer must, therefore, be sustained in favor of all the defendants.

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 JOHN COVENTRY v. GEORGE F. A. ATHERTON.

The seventh section of the limitation act of the 18th February, 1831, 29 O. L. 214, provides "that when any person shall have *left* the state, and *remained* out of the same; or *shall reside* out of the state, *at the time any cause of action shall have accrued against him*, or shall have removed to any place *unknown*," etc., the person having such action may sue within the time limited for the same, after his return or removal to the state. *Held*, that when a defendant *leaves* the state *after* the cause of action accrued, the statute of limitation continues to run, notwithstanding his absence from the state.

**ASSUMPSIT.** From Tuscarawas. The plaintiff declared in the common counts, for work and labor, goods sold, for money had and \*received, lent, etc. The defendant pleaded—1. Non-assumpsit [35 2. That they did not accrue within six years. 3. Non-assumpsit within six years. To the second and third pleas the plaintiff replied, "that within six years after the time, the defendant undertook and promised, etc., to wit, on the 1st of August, 1831, the said defendant left the State of Ohio, and remained out of the same until the 20th of August, 1836, when the defendant returned to the State of Ohio, and

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the plaintiff, within six years after the return, etc., viz. on the 26th of August, 1836," etc., commenced suit, etc. To this replication the defendant demurred, which is joined.

ATHERTON and PECK, for defendants.

CULBERTSON and HANCE, for plaintiff.

By the Court, HITCHCOCK, Judge. The pleadings in this case, call for a construction in part of the seventh section of the act for the limitation of actions, passed February 18, 1831, 29 O. L. 214. This section provides "that when any person shall have *left* the state, and *remained* out of the same; or *shall reside* out of the state, *at the time any cause of action shall have accrued against him*; or shall have removed to any place unknown to the person in whose favor such cause of action may exist, *during such time as is limited by this act*: the person having such cause of action, shall have a right to commence his or her action against such person, within such time as is limited as aforesaid, after his or her return or removal to the state; or if within the state, then within such time, after his or her place of residence shall become known."

As a general rule, and unless provision is otherwise made, when a statute of limitation once begins to run against a demand, it continues to run until the demand is barred. Still it is within the power of the legislature to prescribe differently. And it would probably be conducive to justice, so to change the rule, that the statute should cease to run during such time as a debtor should be without the jurisdiction of the court of the state, or should have absconded and concealed his place of residence from his creditor. On the part of plaintiff in the present case it is supposed that the section above quoted goes beyond this case, and provides, that if after the statute has begun to run, a debtor shall remove or reside out of the state, or shall conceal himself from his creditor, and shall subsequently return to or come within the state, or his place of concealment become known, that the creditor [36] has the time limited in the statute after such return, \*etc., within which to commence his action. Such, however, is not the provision.

This seventh section provides for three classes of cases: 1. "When any person shall have left the state and remained out of the same." 2. When any person "shall reside out of the state," and 3. When any person "shall have removed to any place unknown to the persons in whose favor a cause of action may exist." As to the two former classes, it is enacted that if they shall have thus removed and remained

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or resided out the of state, "*at the time any cause of action shall have accrued against them,*" the person having such cause of action, may commence his suit "within such time as is limited as aforesaid," after their return or removal to the state. The provision is nothing more nor less than this, that the statute shall not begin to run in favor of any person, until such person is within the jurisdiction of the state, and in a situation that suit may be prosecuted against him in our own courts.

As to the other class of cases, there is more difficulty, although probably the intention of the legislature was the same. The provision is, that if any person "shall have removed to any place unknown to the person in whose favor such cause of action may exist, *during such time as is limited by this act,*" then the person having such cause of action, may commence suit within such time as is limited by the act, "after his or her place of residence shall become known." In the former part of the section the expression is, "*at the time any cause of action shall have accrued against him,*" in this "*during such time as is limited by this act.*" Upon this clause it might be argued with some plausibility, that if a person against whom a cause of action existed, should abscond and conceal himself, the effect would be not only to destroy the force of the statute from such time until the place of his concealment should become known, but to destroy its force for the time it had already run. It is not necessary, however, in the present case, to give any definite opinion on this part of the section.

In the case before the court, the replication shows that, "*at the time the cause of action accrued*" the defendant was within the state, and left afterwards. It does not appear that he removed to any place to the plaintiff unknown.

Demurrer sustained, but leave given to the plaintiff to amend upon the payment of costs.

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 \*HARRIET L. PIATT v. JACOB W. PIATT.

[37]

Where the Supreme Court decree a dissolution of the bonds of matrimony, a *gross sum* may be decreed to the wife, and also *another sum* every three months during the joint lives of the parties, *as alimony*.

But such a decree, if erroneous, can not be questioned in resisting a sale upon execution under it.

## Piatt v. Piatt.

Where alimony is decreed in a gross sum, or in instalments, the decree may be enforced by execution for such instalment as it becomes due, or any number of instalments, due when execution issues, may be included in one writ.

Motion to set aside a sale and execution. From Hamilton county. At April term, 1836, a divorce from the bonds of matrimony was decreed in favor of Mrs. Piatt upon the aggression of her husband. A prayer for alimony to the wife was then taken under advisement, upon which the court afterwards decreed, "that the defendant pay to the clerk of the supreme court, in Hamilton county, for the use of the complainant, the sum of one hundred and fifty dollars on the 1st of Sept., 1836, and seventy-five dollars as alimony, at the expiration of every three months thereafter, for and during the period of the joint lives of the said Harriet L. and Jacob W. Piatt; and that in case of failure to make either of the payments aforesaid, execution issue therefore as on a judgment at law." The court further ordered, "that this decree stand as a lien on the lands of the defendant, to secure the payment of the said several sums as aforesaid."

On the 6th of March, 1837, a writ of *feri facias et levare facias*, issued from the clerk's office, in favor of the said Harriet, against the said Jacob, commanding the sheriff to make the sum of three hundred dollars, "which H. L. Piatt, in a petition for divorce and alimony, at, etc. recovered against him for alimony, whereof the said Jacob W. Piatt is convicted, as appears to us of record." On the back of this writ is endorsed, "alimony one hundred and fifty dollars, interest from Sept. 1, 1836,—seventy-five dollars, interest from Dec. 1, 1836—seventy-five dollars, interest from March 1, 1837." The costs were also endorsed.

Upon this writ a levy was made on lot 19, in Cincinnati, an appraisement had, and a return, lot unsold for want of bidders. Afterwards a *venditioni exponas* issued, similarly endorsed, but with additional costs. The sheriff returned a sale of the lot upon this *venditioni exponas*, to B. M. Piatt, for six hundred and five dollars. The sheriff's return coming up for confirmation, a motion was interposed on the part of the defendant and of the purchaser, to set aside the writ and sale, for the following reasons:—

38] \*1. That the execution is irregular, having issued for too much. 2. That it is for *alimony*, while alimony can only exist while the relation of husband and wife subsists. 3. That it issued upon a void judgment or decree. 4. That the clerk's proceedings in issuing it are

irregular and void. 5. That there is no decree to warrant it. 6. That no appraisement is returned with the writ, and it is not shown that any was made by three disinterested freeholders.

J. C. WRIGHT and T. WALKER, for the motion, declined arguing the last objection, as the facts would speak for themselves. The other objections, for convenience, they considered together.

Alimony, in its legal signification, is an allowance of *subsistence* to a married woman from the estate of her husband, while she is lawfully separated from him, and can only be allowed while the relation of husband and wife exist. The court may order alimony to be paid upon a decree of divorce from bed and board; or pending a bill for divorce; or upon lawful separation for any cause for which a divorce might be decreed. But no decree for alimony is known in practice, or recognized as right, where the marriage contract is dissolved.

The statute of Ohio follows the English rule. The fifth section of the divorce act, 29 O. L, 432, provides, that where a divorce is granted upon the aggression of the husband, the woman shall be restored to all her lands and tenements, and may be allowed by the court, "out of her husband's real and personal estate, such *share* as the court shall deem reasonable, having regard to the *personal property that came to him by marriage*, and his estate at the time of the divorce." This seems plain. Upon such divorce, the woman shall have her land restored, and the court may allow her, in addition, *such part of her husband's estate*, as, all things considered, they may deem reasonable. This enactment attempts no change of the law—it merely declares it. It does not speak of *alimony*, or contemplate it, because, as we think, alimony could not properly be considered, when the relation of husband and wife was severed. Upon the dissolution of the marriage, the law looks to a *division* of the property upon equitable principles, first giving back to the wife her land, and secondly, allowing her what is equitable as her portion of the remaining property, having especial regard to what she brought in. We insist this allowance must be in gross, having relation to the property held when the divorce is decreed. It can not be made dependent upon any future *contingency*, as the duration of life. It can not be allowed as an *annuity*, because it is not subsistence or *\*alimony*, to be paid from time to time as required, [39 but is a division of the effects of the husband and wife when they cease to be such, and looks particularly to what each brought in, and to what may have been acquired afterwards during their matrimonial connection. This allowance was not regarded by the



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general assembly as alimony, as will clearly appear by reference to a succeeding section of the act.

In the seventh section of divorce law, 29 O. L. 432, power is expressly given to the court to *grant alimony* to the wife for her *sustenance*, in the following cases. 1. During the pendency of a petition for divorce. 2. Where she prays alimony without asking a dissolution of the marriage. This accords with our construction, and is the only grant of power to the court on the subject of alimony that we find; and if the power to grant alimony be a common law or chancery power, our constitution only confers it on the court in *such cases as shall be directed by law*. The court has only a limited jurisdiction in divorce cases. It can not divorce from bed and board merely, but may dissolve the bond of matrimony. When that is decreed at the instance of the wife, the court *must* restore to her *her* lands, and *may* moreover allow her a reasonable portion of her husband's estate. If the estate be land, the court may apportion a part of it to her. So if in money, goods, furniture, etc., it may be apportioned to each a part. The court may make this apportionment by an allowance of a gross sum in money. In either event, the property set apart or the sum allowed is thenceforth her's; and the controversy ended.

In the case before us, the court *dissolved* the marriage, and ordered one hundred and fifty dollars to be paid to the clerk, by the 1st of Sept. 1836, and then add, "and seventy-five dollars *as alimony*, at the expiration of every three months thereafter" during the joint lives of the parties. We think it clear, that the *alimony* part of this decree is null and void, because the court had no power to pronounce it. The execution upon which the levy was made, commands the officer to make three hundred dollars and costs recovered against the defendant for alimony. Now there is no *judgment* or *recovery* upon which to predicate this writ. No decree is recited in it. Are we permitted to conjecture that the writ was issued upon the decree of divorce, although the sum named therein is only one hundred and fifty dollars, and *that* is not decreed for *alimony*? We think the execution unsupported by any judgment or decree, and void. The memorandum on 40] the back of the writ, can not supply any essential \*defect in it, or make it valid. If the writ is void, no proceedings under it can have legal efficacy.

As to the amount above one hundred and fifty dollars, if we refer to the decree, how can the clerk determine, at the end of every three months, whether the parties are alive; whether the money is unpaid;

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or the right to issue execution, without notice, or giving the parties an opportunity to be heard? Or if the right be controverted, how can he *try* it?

It may be said this is not the place or mode of determining the questions raised. If so, we reply, that we understand the court refuses to *review* divorce cases, and if remedy is not given on motion, we see no way to reach the matter.

N. WRIGHT and HODGES, contra, submitted no argument.

By the Court, WOOD, Judge. The first objection raised by defendant's counsel, is not without *apparent plausibility* to sustain it, as an objection to the confirmation of sale, viz. that the execution issued for too large a sum. One hundred and fifty dollars was decreed to be paid on the 1st of September, and seventy-five dollars every three months thereafter. As these distinct sums fall due at different periods, it is urged that a separate execution ought to issue for each. We think execution might issue upon each instalment as it became due; but as the decree is an entire thing, though to be performed by the payment of periodical instalments, if the complainant sees fit to wait until a number of these instalments fall due, we see no substantial reason against including whatever may be due at the time of issuing the writ in the same execution. Such a course is for the defendant's benefit, and he ought not to set it up as an objection. It saves him the expense of several writs and returns. The proceeding is similar to that of a judgment at law for debt, damages, penalty and costs; they constitute but one judgment, though consisting of distinct items. So if a party is ordered to pay costs of several continuances, it is the general practice to include all of them in one execution, under the denomination of costs, in case they accrued in the same cause.

The second point raised by counsel, that alimony can only exist while the relation of husband and wife continues, has no foundation on which to rest, and as Lord Holt once said, he must be a bold man who ventures on such an assumption. It is certainly opposed to the long continued and well settled practice of this court. The authority to grant alimony in this state, is derived from the 5th and 7th sections of the act concerning divorce and alimony, 29 O. L. 432. The [4] fifth section provides, that where a divorce shall be decreed in case of the aggression of the husband, the woman shall be restored to all her lands and tenements, and be allowed out of her husband's real and personal estate, such share as the court shall think reasonable. Here

is power conferred upon the court to dissolve the marriage contract, and allow such amount to the wife, as in its discretion may be thought just. Such allowance, it is true, is not in this place called alimony, but it is clearly intended such. But it is said this alimony must be allowed in gross, and can not be made payable in instalments. The answer to this is, the statute is silent on that subject, and therefore, like the amount to be allowed, is left to the discretion of the court. The practice has been so to decree. Besides, this objection is not so much to the sale, as to the supposed irregularity of the decree, and it is well settled, that errors in a decree can not be reached and corrected in this collateral way. A sale under a judgment or decree, which is merely erroneous, not void, is valid, and will pass a good title to the purchaser. There is nothing in the objection, that the decree in this case was void, because the court had jurisdiction of the subject matter in controversy, and of the parties. In such cases, judgments or decrees are valid, although they may be held very erroneous.

As to the objection, that the clerk's proceedings in issuing the execution, are irregular, and that there is no decree to warrant the execution, the answer is simply, *non constat*.

It is also objected that there is no appraisement returned with the writ, nor statement in the return that the lot was appraised by three disinterested freeholders. The return is in these words, "I have duly appraised, advertised, and offered for sale." Now if the sheriff has *duly* appraised, he has done so by the oath of three freeholders; and the presumption is that the appraisal has been returned, because the law requires it of the officer, and in the absence of anything to the contrary he will be presumed to have done his duty.

We intend in this case to be understood as deciding, 1. That in a decree dissolving the bonds of matrimony, a *gross sum* may be allowed as *alimony*, and be ordered to be paid in gross or in instalments, in the discretion of the court. 2. That such decree may be enforced by execution issued for each instalment as it becomes due, or by one for all the instalments due at the time it is issued. 3. That after sale on such execution, an objection that the decree for alimony is erroneous if not void, will not be listened to.

The motion is overruled, and the sale confirmed.

42]

\*THE STATE, ON THE RELATION OF L. KILBOURN v. ALVAH HAND,

Where an attorney at law has collected money for his client, withheld its payment and applied it to his own use, he may be suspended for mal-practice. Honesty and fidelity to clients are the essential virtues of an attorney's calling, and whenever courts are satisfied he has lost these essential qualifications, they are wanting in *their* duties, if they do not take away his means, and destroy his opportunities of mischievous action.

Complaint against a solicitor of this court, for mal-practice in his official and professional character. From Portage county. The relator states, that he, with Hand and others, were security for the payment of a debt by one M'Cune; that M'Cune deposited with Hand, *in his character as attorney*, sundry demands and notes to collect and pay over upon the debt, and thus relieve the securities from their responsibility. That Hand had collected the debts, but instead of duly appropriating the money, had expended it for his own uses, and that the debt of M'Cune had been collected of relator and his co-securities by process of law. The relator, therefore, for this mal-practice, prays that Hand may be suspended from practising as an attorney at law. The defendant demurs, which is joined.

The case was submitted without argument.

By the Court, LANE, C. J. In this case the question is raised, whether the non-payment of money collected by an attorney at law may be a sufficient cause for his suspension? It is alleged to be a simple failure to keep a promise, for which the law provides a remedy, and that the statute, by imposing a specific penalty in such cases, implies that no severer punishment was intended.

The relation of attorney and client is a necessary one, in every country whose civilization is in any degree advanced. The discharge of professional duties, demands great and unreserved confidence from the client, and the connection of the attorney with courts, and his access to papers, require unsuspected integrity. Hence *general honesty and fidelity to clients*, is not only necessary to his success, but even to the performance of his duties. Other good qualities may be wanting in his character, and some vices may be present, but *these* are the *essential virtues of his calling*, no more to be dispensed with than courage in a soldier, or modesty in a woman. The statute regulating ad-

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Willey v. Scoville's Lessee.

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mission to the bar, requires the court to be satisfied that the applicant possesses these qualities. The public have a right to presume that the court are fully satisfied upon these \*points, and to regard a [43] license to practice as a certificate of good character from them. And whenever the court shall become persuaded that an attorney has lost these qualifications, essential to his usefulness, and necessary to the safety of his employers, they are wanting in *their* duties, if they do not take away his means, and destroy his opportunities for mischievous action.

The defendant is charged with holding money collected by him and using it for his own purposes. Having received the money in his professional character, he was not only bound by his obligations of professional fidelity, to appropriate it as his client directed, but honesty to his co-securities, in this case, demanded its due application. If the facts shall be proved, he ought not to be permitted to claim longer confidence, when he has shown himself so unworthy of his trust.

Demurrer overruled. Cause remanded.

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ELIJAH F. WILLEY v. PHILO SCOVILLE'S LESSEE.

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Where a lot of land is listed for taxation, together with eight others, and so advertised for sale, but the assessment of tax is of one aggregate sum on all, a separate sale and conveyance of them by the county auditor is unlawful, and confers no title.

ERROR to the Supreme Court of Cuyahoga. The suit in the Supreme Court was an ejectment. Lessee of Scoville v. Willey, for four acres of land in Cleveland, in the north-west corner of ten acre lot No. 32. T. 7. R. 12. The bill of exceptions made part of the record, shows that upon trial, the plaintiff deduced title from the State of Connecticut, and rested. The defendants then set up title under a sale by the auditor of Cuyahoga, made in 1823, for the taxes of 1820, '21, and '23, added together. He offered the auditor's record showing the listing of sundry ten acre lots, for taxes for those years, in the name of *unknown heirs*, and among others lot 32, which is in dispute; that several of said lots, including 32, had been returned delinquent. duly advertised for sale, and sold accordingly. That the certificate of

*Willey v. Scoville's Lessee.*

sale of the four acres in the north-west corner of 32, was given by the auditor to the purchaser, upon which the land had been surveyed, and conveyed by the auditor to the defendant. It was admitted that the ten acre lots in Cleveland, in R. 12—7, so called, were originally numbered progressively, and had been conveyed and known by the designation of ten acre lots.

\*Lot 32 was listed with eight others, as follows:—

[44]

*Cleveland Ten Acre Lots.*

Owner's Name.	Range.	Town.	Lots.	Acres & Rate.	Tax.
Unknown Heirs	12	7	32,34,35	2d rate	4 83.5
			38,39,40	90	
			41,42,43		

The lots were advertised in the same way, but the record shows that each lot was put up and sold for the taxes assessed upon it separately, the tax on each being one ninth of the aggregate sum. In this way four acres of lot 32 were sold to defendant.

The plaintiff objected to the manner of listing and the sale made by the auditor, as illegal, and moved the court to exclude the defendant's evidence from the jury, which was done. By this writ of error the defendant below seeks to reverse the judgment, upon the ground that the court erred in ruling out the evidence.

R. HITCHCOCK, WILDER, and ANDREWS, for the plaintiff in error, contended that the land in question was listed and sold according to law. In *Lafferty's Lessee v. Byers*, 5 Ohio, 458, the court say, "it is necessary the description should be such that the owner may know that the tax on his land is unpaid, and that purchasers may know or learn the precise tract intended, and be enabled to estimate its actual value." In the present case that certainty is attained to. The list describes the numbers of the lots, well known, the quantity, and enters all as second rate, and conforms to the requisitions of the statute. 2 Ch. St. 1104, § 24; *Lessee of M'Ginnis v. Willey, Wright*, 152. The court, in *Carlisle's Lessee v. Longworth*, 5 Ohio, 370, remark, that "it is for the interest of all concerned that tax sales should be sustained whenever they can be. The greater the certainty of this description of title, the greater the value which will be attached to the land at the sale, and the less the quantity sold to pay the taxes." The proceedings in this case are in substantial if not literal conformity with the statute, and should be sustained.

The Reporter has been furnished with no argument for the defendant in error.

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Lessee of Hough v. Norton and Others.

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By the Court, GRIMKE, Judge. The proceedings in this case show a defect which is very common in tax sales. Lot 32 was listed and advertised for sale, with eight others of the same ten acre lots, by the following description. The first and second columns contain the 45] \*range and township, the third enumerates the nine lots by their number, and the fifth contains an apportionment in gross, of the tax for which they were delinquent. The law requires that the auditor should so list and advertise the land as to furnish the owner with a description of the land subject to taxation; and that the sale shall be advertised and conducted in conformity with that rule. In this instance there was an assessment in gross of the whole amount of the tax chargeable upon the nine lots, and yet each lot was put up and sold to pay the tax on it separately. The land is not treated as an entire tract in the list, advertisement, or sale, but is so treated in the apportionment of the tax. Now it is evident that the course pursued should have been throughout consistent with itself. If the lots might be treated as separate and distinct parcels of land, then the tax charged upon them should have corresponded with that fact in the description. Or, if they should be treated as one entire tract, then, although the assessment of the tax in the advertisement as one aggregate sum, would have been correct, the description of the land would itself be erroneous, and so also would the sale under which the plaintiff in error claims. In either case, the title is defective, and the court were right in ruling out the evidence.

Judgment affirmed.

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LESSEE OF BENJAMIN HOUGH v. THODA NORTON AND OTHERS.

If after recovery in ejectment, the lessor of the plaintiff contracts to sell the premises to the defendants, the tenants in possession, he can not subsequently revive the judgment by *scire facias*.

A *scire facias* to revive a dormant judgment, should show on its face that time had elapsed since the judgment for it to become dormant.

When a plaintiff who has judgment in ejectment, abandons the possession of the premises, he has the fruit of his judgment, and can not afterwards revive the judgment and have a writ of possession.

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Lessee of Hough v. Norton and Others.

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**SCIRE FACIAS**, to revive a judgment in ejectment. From Clark. The writ recites that the plaintiff lately recovered a judgment in the Supreme Court of the County of Clark, for certain lands and tenements, included in a military survey of five hundred acres, patented to Benjamin Hough, on the 31st of January, 1818, and which survey is within the County of Clark. That execution had not been had of said judgment. And requires of the defendants to show cause why execution should not issue, etc.

\*The writ was served upon eight of the defendants therein [46, named, and returned *nihil* as to three others. No second *scire facias* was ever issued, so that as to those three defendants there has been no service.

The defendants who were served with process, pleaded *nul tiel record*, to which plea a notice is attached.

The notice sets forth that the damages and costs recovered, in the action of ejectment, have been paid. That previous to the recovery, the lessor of the plaintiff died, and the land descended upon his heirs. That Allison C. Looker was appointed his administrator, and was authorized by a special act of the general assembly, to act as the agent of the heirs in the disposition of the real estate descended upon them. That after the recovery of the judgment, to wit, on the 30th day of July, 1821, the said Looker entered into contracts with the tenants in possession, who were defendants in the action of ejectment, by which he sold them the lands, held by them severally, upon the terms specified in said contracts. By the terms of these contracts, payment of the purchase money was to be made in one year, but the time was afterwards extended. There is no allegation that payment was ever made. It is further stated in the notice, that previous to the death of Hough, sundry judgments were recovered against him in the Court of Common Pleas of Ross County; that these judgments were revived by *scire facias* against his heirs; that executions were issued upon these judgments, thus revived, and levied upon the lands in controversy. The tenants in possession purchased the land at sheriff's sale; the sale was regularly confirmed by the Court of Common Pleas of Ross County, and deeds ordered to be made, which was subsequently done. These proceedings are all set forth at length with accuracy and precision.

The contracts referred to in the notice, copies of record of the judgments in Ross County, the execution pursuant to those judgments, and the returns thereon, the confirmation by the Court of Common



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Lessee of Hough v. Norton and Others.

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Pleas, and the sheriff's deeds to the purchasers, were all given in evidence.

The case was submitted to the court at the last term in Clark County, and reserved for decision.

R. DOUGLASS, for plaintiff.

S. MASON and TORBERT, for defendants.

By the Court, HITCHCOCK, Judge. In submitting this case to the court, the parties seem to have waved all informalities, otherwise it might be difficult for the plaintiff to proceed at all with his case, inas-  
47] much \*as no service has hitherto been made upon three of the defendants. The *scire facias* itself is defective. It recites that a judgment was *lately* recovered in the Supreme Court of Clark County, without any reference, however, to the date of the recovery, and we are left in uncertainty, so far as the *scire facias* is concerned, whether the judgment had been rendered one year or twenty years before its date. It ought, at least, to have been shown that the judgment sought to be revived had become dormant, either from lapse of time or from some other cause. These matters, however, are waived, and the question presented to the court is, whether the facts set forth in the notice constitute a defence to the action, these facts having been fully proved.

In point of fact, the judgment was recovered in 1820, Hough the lessor of the plaintiff having died in 1819, during the pendency of the suit. By the act of February 18, 1820, "appointing Allison C. Looker, agent for the heirs of Benjamin Hough, deceased," the said Looker is authorized and empowered to manage the real estate left by Hough, as fully as Hough might have done while living. Previous to the enactment of this law, Looker had been, by the Court of Common Pleas of Ross County, appointed administrator of Hough's estate. In the fourth section of the before recited act, it is prescribed "that all acts, deeds, conveyances, and transactions done, and executed, and signed by the said Allison C. Looker, as agent for the heirs of Benjamin Hough, deceased, shall be good and valid in law to all intents and purposes." Under the authority conferred by this special law, Looker entered into the contracts referred to in the notice. At the time the contracts were made, the purchasers were in possession of the premises, and were the defendants against whom the judgment in ejectment had been rendered. If the authority of Looker was valid, and this is not questioned by the plaintiff's counsel, then these

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Lessee of Hough v. Norton and Others.

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contracts must have the same effect they would have had, had Hough himself been living, and had he made them.

What effect then would a contract for the sale of lands by a lessor of a plaintiff in ejectment to the defendant have upon a judgment previously rendered for the recovery of the same lands?

The object of an action of ejectment, is to ascertain the legal right to the possession of the land in controversy, and the fruit of the judgment, if in favor of the plaintiff, is the recovery of the possession. After a recovery, if the defendant abandon the possession, which is taken by the lessor of the plaintiff, or if the defendant surrenders the possession to the plaintiff, no writ of *haberi facias* is necessary. The plaintiff enjoys the fruit of his judgment, as completely as he \*would have done, had the judgment been for money, [48 and the money actually paid without execution. In either case the judgment is satisfied except as to costs. And under such circumstances, should the defendant again enter upon the land after a lapse of years, and dispossess the plaintiff, I apprehend the owner must again resort to his action of ejectment, and could not dispossess the tenant by reviving his former judgment.

Should the lessor of a plaintiff, after judgment, lease the land in controversy to the defendant, and should the tenant fail in the payment of rent, the landlord could not, for the purpose of enforcing payment, resort to his writ of possession under his judgment. When the tenant takes the lease he admits the right of the landlord, and for the recovery of rent the landlord must look to the covenants of the lease. From the time of the execution of the lease, the relative situation of the parties is changed. The possession of the tenant is not adverse to, but in accordance with, the rights of the landlord. His possession for many purposes will be considered as the possession of the landlord. And the latter has, in fact, derived all the advantage from his judgment, which that judgment was intended to secure.

So, should the lessor of a plaintiff, after judgment, convey the premises in controversy to the defendant, and afterwards take a writ of possession against the tenant, he would be restrained. And certainly in such case, after the judgment had become dormant, it could not be revived.

The principles seem to be applicable to, and decisive of the case before the court. After the rendition of the judgment, the land was sold by contract to the defendants. By entering into this contract, the relative situation of the parties was entirely changed. From that.

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*Lessee of Hough v. Norton and Others.*

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time the defendants did not hold adversely to, but they claimed under the title of the lessor of the plaintiff. He had secured all he desired by his action. His right was established, it was admitted, and the defendants contracted to purchase that right. They were in possession when the contract was made, and with the assent of the plaintiff. They were no longer trespassers, but their possession was legal, and for many purposes it was the possession of their vendor. In fact, they must be held to be precisely in the same situation with any other persons who should have purchased the same land by contract, and taken possession in pursuance of the purchase. And it would be strange, indeed, that a vendor having sold land by contract which had [49] been by him recovered in ejectment, should be allowed to oust the purchasers in virtue of a judgment which gave him the possession and enabled him to sell.

It is claimed, however, that inasmuch as payments were not made according to the stipulations of the contract, that therefore the same is void, and the plaintiff is restored to all his original rights. We think otherwise. By entering into the contracts, the right of the lessor of the plaintiff to take execution upon his judgment, was not merely suspended, it was gone for ever. If payment was not made according to contract, he might have his action for the money, or he might have a new action of ejectment to recover the land, but he could not revive his former judgment, because that judgment had been virtually satisfied.

Such being the opinion of the court upon this part of the case, it is unnecessary to inquire as to the validity of the sales under the judgments in Ross county.

Judgment for the defendants.

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**PATSEY HENRY AND OTHERS v. JOHN DOCTOR AND OTHERS.**

Where H. conveys to B. and his heirs (all residents in Virginia) land in Ohio upon trust, a sale made by another trustee substituted for B. after his death by the Court of Chancery in Virginia, is invalid.

In such case the land descended to B's heirs in trust, and the trust may be enforced against them, or by the Ohio courts.

It would be difficult, since *Wills v. Cooper*, 2 Ohio, 128, to sustain an authority to convey a legal title to land, except derived from its owner, or from a court of territorial jurisdiction

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Henry and others v. Doctor and others.

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**BILL IN CHANCERY.** From Warren. The bill is filed by the widow and heirs of Moses Henry, claiming nine hundred and twenty-one acres and three quarters of land in Warren county, against the heirs, etc., of William R. Buck. In 1821, Moses Henry and wife, residents of Virginia, conveyed the tract of land in dispute and certain personal property to William R. Buck and his heirs, also of Virginia, *in trust*, to sell, and pay certain debts, and appropriate the balance on certain conditions. Both Moses Henry and Buck died soon after the deed was made, without execution of the trust by a sale of the land, both leaving heirs at law.

In 1828, George Baily, one of the beneficiaries of the trust, and certain creditors, instituted proceedings in the superior court of chancery, in Winchester district, Virginia, representing the death of \*the [50 trustee, and praying the appointment of another to complete the execution of the trust. Patsey Henry, widow of Moses, and one of the creators of the trust, and to whom the balance of the money, after paying the debts, belonged, and the heirs of Buck, were not parties to these proceedings. One of the heirs of Henry was served with process, the others were made parties by publication, and the matter was taken as confessed by all. Upon hearing, the Chancellor appointed William R. Ashby a trustee, instead of Buck, to complete the execution of this trust, by a sale of the lands in Ohio. The defendants claim title under a sale made by Ashby. The plaintiffs pray that the defendants, who claim various interests under Ashby, may be held their trustees; to set aside all the proceedings under him as substituted trustee; and to be let in to redeem the land, by payment of the debts under the provisions of the trust deed.

J. MILTON WILLIAMS, for plaintiff, argued at length, examining the authorities and denying the power of the Virginia court of chancery, to appoint a trustee for real estate in Ohio, etc. etc. He cited the following authorities; Jer. Eq. Ju. 20, 24, 26, 162 to 167; 4 Kent C. 304, 5, 6; 1 Cruise Dig. 524, 5, 6, 539, 481; 3 do. 464; 3 Mass. 573; 15 do. 468, 2 Blk. C. 328, 334; Coop. Eq. Pl. 33, 4; Doolittle v. Lewis, 7 Johns. Ch. 45, 47; Harrison v. Story, et al. 5 Cranch, 302; Lessee of M'Culloch v. Reddish, 2 Ohio, 234, 5; Rogers *et al* v. Allen, 3 Ohio, 488, 9; Watts *et al* v. Waddle, 6 Pet. 395 to 402; Nowler v. Coit. 1 Ohio, 519; Wills v. Cooper, 2 Ohio, 124; Adm's of Winthrop v. Huntington and wife, 3 Ohio, 327; St. Clair v. Smith and Milliken, 3 Ohio, 364, 5; Story Conf. of L. 300, 437, 453, 463, 465, 467, 358, 416; 29 Ohio, L. 25, 6; 1 Ch. St. 685; 2 do. 786, 1130, 1277; 3 do. 1596.

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Henry and others v. Doctor and others.

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G. J. SMITH, for defendant Doctor, contended that the trust did not lapse on the death of Buck, the trustee, and that chancery had power to supply the trustee, 2 Ohio, 131; 2 Ves. 561; 16 Ves. 27; 4 Kent C. 338. Buck being a mere naked trustee, having died before executing the trust, the Virginia chancellor, where the parties resided, had power to appoint Ashby trustee, and his sale and conveyance to Doctor in executing the trust is valid. 7 Johns. Ch. 48; 6 Cranch, 157, 160; Judge Sherman, 2 Ohio, 131; 3 Dal. 370 note; 3 Ves. 447; 1 Bos. and Pul. 133; 1 Ves. 144; 2 Vern. 494; 1 do. 419, 75. Mere irregularity in the Virginia proceedings will not vitiate them. Though 51] erroneous, they are good \*until reversed, and they can not be impeached\* collaterally. 7 Ohio, 198; 3 Ohio, 257, 325, 561, 364; 4 Ohio, 130; 2 Pet. 163; 2 Bin. 46. In cases of fraud, trust, or contract, chancery has jurisdiction wherever the persons are found. 6 Cranch, 157, 8, 9: 1 Vern. 75, 419; 2 Vern. 494; 7 Johns. Ch. 45; 4 Kent C. 338; 8 Ves. 547.

By the Court, LANE, C. J. Much of the testimony in this case consists in an attempt to prove and disprove fraud in the management of the property. It will be unnecessary for us to examine this, if we find that Ashby, the substituted trustee, had no authority to make sale.

Whether the courts in Virginia could confer any power, under any condition, to convey lands in Ohio, is a question which we need not now examine, although it would be difficult, after the case of *Wills v. Cooper*, 2 Ohio, 126, to sustain an authority to convey a legal title to land, except derived either from the owner, or from the court of territorial jurisdiction.

In this case, by the death of Buck, the land descended to his heirs. Neither they, the legal owners, nor Patsey Henry, who was the ultimate *cestui que trust*, with the right of acquiring a title to the land from the trustee by payment of the incumbrance, were parties. Without examining, then, how far the heirs of Henry were affected by these Virginia proceedings, it is plain that Buck's heirs and Mrs. Henry are not concluded. The legal title still remains in Buck's heirs, and Mrs. Henry may enforce the execution of the trust, either by the trustees she united in selecting, or by the courts of this State; or she may redeem the land under the provisions of the deed. The sales, therefore, under the proceedings in Virginia, are held entirely void and set aside, but a compensation should be made to the purchaser, under the principles of our occupying claimant law.

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Hutchinson et al v. Thompson et al, and Gidings et al v. Thompson et al

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The case is referred to a master to take and state, 1. An account of the amount of debts secured by the trust which remain unpaid, with their present holders. 2. The value of the improvements. All further questions are reserved to the further hearing.

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**\*S. R. HUTCHINSON AND OTHERS, v. S. THOMPSON AND OTHERS. [52**  
**AND**  
**O. M. GIDINGS AND OTHERS v. S. THOMPSON AND OTHERS.**

The clause in the ordinance of 1787, for the government of the Northwestern Territory, declaring the navigable rivers therein "common highways, etc. without any tax, impost, or duty therefor," does not prohibit the states formed in that territory, from legislating respecting those rivers, or affecting their navigation, when their regulations subject equally their own citizens and the citizens of other states, to the inconvenience resulting from such legislation.

The clause imposes a limitation upon the power of congress to control the navigation of such rivers, within the limits of the new states, and prohibits the states from imposing discriminating restrictions, duties, and imposts, upon the citizens of other states, prohibiting the states from legislating to regulate commerce among the states.

Any other construction would not admit the new states into the union upon an equal footing with the original states.

An injunction to the building of a bridge will not be granted, unless the evidence clearly show that the bridge, if erected, would be an obstruction to the navigation of the river.

**BILLS** in chancery for injunction. From Cuyahoga county. The two bills depending upon the same principles of law, and similar allegations and proofs, were argued by counsel, and considered by the court, together. The bills assert that the Cuyahoga river at Cleveland, is a navigable river, declared so by the laws of Ohio, and within the ordinance of congress of 1787, and therefore a common highway, to be kept for ever free to the citizens of the state and of the United States. That the complainants are forwarding merchants, owners of water lots on said navigable river, (which, at that point, forms part of the harbor of Cleveland,) with large and valuable warehouses and wharves erected thereon, and used for the prosecution of their business, of

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transporting merchandise and produce upon said river, and upon Lake Erie, in steamboats, and in vessels propelled by wind. That the defendants, in violation of law and the rights of complainants, have commenced obstructing the navigation of said river, below the said warehouses and wharves, by the erection of a bridge over said river, and by placing timbers, driving piles, building piers and abutments, in the navigable parts thereof, thus obstructing the free navigation of said river and harbor, to the irreparable injury of the complainants, the destruction of their business and property. And therefore the complainants pray a perpetual injunction against such obstruction and for general relief. The answers admit the claim of property in the complainants, their alleged business, and the navigable and free character of the river; admit also, that they are erecting a permanent draw bridge across the river, to be supported upon two abutments and 53] two piers, but insist that they will be at such distance from each other, and that the draw will be elevated so high, as to admit the free passage of every species of water craft. They assert a supposed right to erect said bridge under certain acts of the General Assembly of Ohio, authorizing such structure, and providing for its preservation; and they insist that the value of their property, at and near the bridge, will be much reduced in value if the bridge is prohibited. Much testimony was taken as to the character of the bridge to be built, (which was intended to connect the cities of Cleveland and Ohio,) and its effect upon navigation and upon the value of property, which can not be here stated, without too much extending this report. The opinion of the Court is referred to for such facts as influenced the decision.

J. W. WILLEY, and S. J. ANDREWS, for the complainants, insisted, that the declaration in the ordinance of 1787, that the navigable waters leading into the Mississippi and the St. Lawrence, should be common highways, and forever free, and the provisions of the acts of Congress excluding the beds of rivers from the survey of the public lands, together with the Ohio acts declaring the Cuyahoga navigable, solemnly appropriated the river to the free, sole and only purpose and use of navigation, in the broadest sense, inhibiting its use for any other purpose which can impede or interrupt this entire freedom in any degree. The public is thus secure, not only in the enjoyment of the entire surface of the stream, but also to an indefinite extent above and below. "*Oujust est solum, ejus est usque ad cælum.*" Our streets in towns and common roads are public highways. Can it be admitted for a moment, that any one has a right to throw a bridge across our

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streets for a walk, if high enough to admit the passage beneath of the highest vehicle? the right thus to exclude from our streets and high ways light and air, essential to their full enjoyment? The right can only exist where there is no obstruction, that prevents the use of any part or the whole of a public highway or navigable river. If impediment be admitted at one point it will be justified in another. The interest or passion which prompts one man to obstruct the channel in one place, will prompt another man to obstruct it in another. Instead of one bridge, ten, twenty or a hundred, are justified upon the same claim of right that justified the first, until the whole river is filled up, the last structure being no greater impediment than the first, until the navigation is annihilated. Greater interests are involved in this question, than the mere property of the complainants. The public has a much greater interest <sup>at</sup> stake in these suits than the litigants. [54 Navigation has already made Cleveland a great commercial mart, with an increase of shipping and commerce without parallel in the history of our rapidly improving country. An enlargement of her harbor is daily taking place from necessity. The general government has already expended nearly one hundred thousand dollars for its improvement. Individual enterprise has added vast sums to these expenditures. Shall these gigantic strides onward be arrested, to accomodate the few at the expense of many? The river at the place of the bridge is one hundred and eighty feet wide only, and when the draw is down, the bridge obstructs *the entire river*. The draw is only sixty feet, and when up, it still leaves two thirds of *the whole* covered with a solid superstructure of immoveable materials! Can it be successfully maintained, that to shut up permanently two thirds of the river, and to subject to a timely withdrawal of a part of a bridge used as a common highway, would leave the navigation *free*? Will the permanent closing up of two thirds of a navigable river, and placing a bar across the remainder, which every navigator must stop and remove, and cautiously warp through, offer no impediment to its free navigation?

They cited 5 Ohio, 110; 6 Ves. jr. 689; 2 Atk. 182; 10 Ves. jr. 194; 2 Johns. Chap. 164; 2 Vern. 390; 1 Vern. 120, 7, 275; 16 Ves. jr. 338; 7 Johns. Ch. 314; 18 Ves. Jr, 215; 6 Johns. Ch. 439; 12 Pet. 98; 19 Ves. jr. 616; 9 Wheat. 1; 3 Cow. 739; 1 Kent C. 437; 1 Pick. 180; 12 Mass. 492; 10 Mass. 70; 8 Cow. 146.

H. FOOT and R. HITCHCOCK, contra, admitted the validity of the ordinance of 1787, that the Cuyahoga is a navigable river, and that this court gave a true construction of that ordinance in 5 Ohio, 410.



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They contended the bridge to be erected was upon a public highway across said river, where a bridge of some kind had been kept up by the public since 1820, and was essential to the public convenience, and no fair construction of the ordinance and the laws could prevent the state from constructions to facilitate commercial intercourse, and improving the channels of intercourse. If the power of Ohio, and of the new states, was thus curtailed, she was not in the union, though such was the express provisions, upon a footing with the original states. The Supreme Court of the United States, in *Gibbons v. Ogden*, 5 Wheat. 1, decided that laws "regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc. are 55] component parts" of the mass of legislative power left with the states. A late case in New York, 12 Wend. 113, had raised the precise question before us; the right to build a bridge across the Hudson river at Troy, under a legislative act of that state, leaving over the main channel an opening for a convenient and suitable draw. The court thought the place of the bridge one which vessels had a right to pass, and where any obstruction *entirely preventing* or *essentially impeding* the navigation would be unlawful; but held, that by a *free navigation* must not be understood one free from such partial obstacles and impediments as the best interests of society may render necessary. If the state power was adequate to compel the observance of quarantine laws, which may wholly stop the navigation for a month or more, or may establish and regulate ferries, etc., it has power to erect bridges, which is but a substitute for a ferry, and one of many means or channels of internal commerce, essential to its convenient exercise; and therefore that a draw bridge properly constructed might be erected over a navigable river. See also, 2 Pet. 245; 7 Pick. 445; 1 Pick. 180; 4 Pick. 460; Ang. Tide W. 48; 9 Johns. 507; 1 Kent C. 411; 8 Cow. 146; 4 Wend. 9; 15 Wend. 115. The ordinance of 1787 does not in fair construction prohibit impediments, but only the imposition of tax, impost, or duty.

But the ordinance of 1787, never was in force in that part of Ohio called the Connecticut Western Reserve, where this river is situate. The charter of Charles II. to Winthrop and others, granted the soil and governmental jurisdiction, to all the country between the forty-first and forty second degree and two minutes north latitude, from the Narraganset Bay on the east to the Pacific ocean on the west. This grant includes the Cuyahoga river and the whole of the Reserve. In 1783 Connecticut by proclamation asserted her claim to this grant as

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to all lands lying west of Pennsylvania. See Mr. Marshall's Rep. 16 state papers, 94. In 1786, Connecticut ceded this territory to the United States, except the reserved tract lying between the west line of Pennsylvania and a parallel line one hundred and twenty miles west thereof. 1 Ch. O. L. 64. The ordinance of 1787 was expressly made for the government of the territory of the United States. And Congress made provision for sale of the lands within said territory; but neither the right of soil or jurisdiction in the Reserve was ever vested in the United States, until the deed of cession by that state to the United States, 1 Ch. O. L. 65, vested in them "the jurisdiction of the territory." This was long after the ordinance of 1787. Ohio, therefore, in her sovereign authority over the Cuyahoga, \*is [56 not limited by any provision of that ordinance, and may, in her discretion, regulate her internal commerce as her judgment shall dictate. The question whether the contemplated bridge will be a nuisance or not, is one of fact. 6 Barn. and Cres. 566; 3 Am. Jur. 185, 190, 200; 3 Kent Com. 430, note.

They cited several legislative acts authorizing the construction of a bridge at the place, and insisted they operated *to dedicate* the ground and crossing of the river to the public as a highway, and cited 11 East. 375 n.; 5 Taunt. 126; 1 Camp. 260; 2 N. Hamp. 513; 2 Ver. 480; 3 Ver. 521; 2 Saund. 175, c. note e.; 6 Ohio, 303; 2 Str. 1004; 2 Stark Ev. 662. This being a public highway, and a former bridge having been carried away, it is the common law right of the respondents to repair and rebuild it. Cro. Eliz. 184; 1 Com. Dig. 307; 9 Wend. 571.

S. J. ANDREWS, for plaintiff, in reply, examined the arguments and authorities cited by the respondents' counsel, and insisted, that if the river was a public highway, as the ordinance of 1787, and the legislative acts declared it to be, then the order for erecting a bridge across it, in the language of the court, in 1 Pick. 186, "is void." He insisted that neither the case of the *staiiths* in the Tyne near New Castle, nor the bridge over the Hudson at Troy, sustained the defence. In the former case the court thought the mode of lading vessels by *staiiths* took up less room and interposed less obstruction to the navigation, than the former mode by lighters. 6 Barn. and Cres. 566. In the latter case the defendants set forth legislative authority to build the bridge, not impairing the usefulness of the river as a public navigable stream, and averred they had so erected the bridge, which was admitted, in the question submitted to that court, and therefore, and

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because it was merely to try the right, no one being injured, the structure was not disturbed. 12 Wend. 131.

As to the claim that the Western Reserve was exempt from the operation of the ordinance of 1787, he observed that the fifth art. of that ordinance expressly provides for the boundaries of the eastern state of the North Western Territory, now Ohio, so as to embrace the Reserve. Although the right of soil was in Connecticut, Congress exercised jurisdiction over it, precisely as it did over the residue of the territory, and in pursuance of the provisions of the ordinance, and of the acts of Congress, the present constitution of state government of Ohio was formed, in which the provisions of the ordinance are 57] \*recognized and ratified. Upon the doctrine of counsel, slavery might be introduced in the Reserve under a new constitution, though prohibited by the ordinance in all the rest of the state.

Neither of the counsel for respondents pretend to deny, but the bridge if erected will be a total obstruction to the navigation of the river by steam boats. It is well known, that the most important navigation on the Lake connected with the port of Cleveland, is by steam boats, and this court will never sanction an obstruction to the navigation which will drive that description of vessel from our harbors. But what right have respondents to compel the warping of schooners and other vessels propelled by wind past this bridge, if business shall require them to be taken above? We think the bridge a nuisance upon common principles. The Supreme Court of New York, in the case of *Lansing v. Smith*, 8 Cow. 152, declare the true doctrine, that "a ditch dug in a public highway, which from the local circumstances of the country, is seldom or never used, but by one or more families, is still a *public nuisance*, not because any considerable portion of the public is actually affected by it, but because *it obstructs a passage which all have a right to use.*"

By the Court, GRIMKE, Judge. The ground which the complainants assume, in order to entitle them to a perpetual injunction, is, that the work prosecuted by the respondents, will be a permanent obstruction to the navigation of the Cuyahoga, and inasmuch as their property, and the business in which they are embarked, are dependent for their value upon the free navigation of the river, that the work undertaken by the respondents will draw after it an irreparable injury to them.

Will, then, the contemplated bridge obstruct the navigation of the river? Will it, if permitted, be a violation of the ordinance? And

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will it be productive of irreparable mischief to the complainants? For the first question the state may be considered a party; in the second, the government of the union is directly interested; and the third has relation more immediately to the respective rights of the complainants and respondents. And yet the determination of the first two, may, in reality, decide the last, for inasmuch as private individuals may maintain a suit for an injury occasioned to them by a *public nuisance*, yet the moment that the question of nuisance or no nuisance is determined in one way, an end will be put to the question of private right also.

Whether the erection of a bridge will impede the navigation of the \*river over which it is thrown, must necessarily depend upon cir- [58] cumstances. It will, in some measure, depend upon the nature of the bridge which is to be erected, the particular situation where it is placed, and the kind of vessels which navigate the river. When a communication is thus established between the opposite banks of a stream, it is for the purpose of facilitating the travel and transportation upon the highway which leads to it: and if this highway should, as in the present instance, be one continued street, connecting two densely peopled towns, and binding them together as one community, it would not be right for the mind to fasten its attention exclusively upon one of these objects, or to consider the one as merely subordinate to the other. Such a case presents, at any rate, a conflict of interests, if not of rights, and it should be our endeavor, if possible, so to reconcile them, that the one shall not encroach upon the other. One reason, perhaps, why the navigation of the river is considered the primary, and the freedom of the highway as the secondary interest, is, that rivers are found traced upon the map of the country on its first settlement, while the road or the street is an artificial work, undertaken and abandoned, as the exigencies of society may require. It is a reason calculated to impose upon the imagination, for the latter may acquire as great if not a greater importance than the first.

It appears that the legislature of this state, in 1817, passed an act declaring the Cuyahoga River navigable, and at the same time prohibited, under severe penalties, all obstructions to the navigation of it. It is sometimes difficult to determine what is the precise character of a stream. Rivers were once divided into navigable and not navigable. They are now generally divided into three classes, the two former, and a third partaking of the character of each of the others, and yet distinguishable from both. The act of 1817, however, must

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be considered as affording unequivocal evidence of what was the intention of the legislature with regard to this stream. There is no gainsaying its provisions, so long as they stand uncontradicted by the same authority which declared them. And this renders it very important to examine several other statutes, for the purpose of ascertaining the true construction which should be given to the act of 1817, or for the purpose of answering a still further inquiry, whether that act has not, by necessary implication, been repealed, so far as regards the subject matter of this suit? The fact that the legislature, when they have declared a river navigable, have generally specified mill dams as an obstruction, can not be considered as evidence of an intention to except every other mode of impeding \*the naviga-[59]tion. Nor is the fact that they have authorized the erection of dams and aqueducts in the construction of the great public works of the state, conclusive as to what individuals may do: though this may be a circumstance of some importance hereafter, in giving an interpretation to the ordinance, and determining the right of the general government.

It is shown that a road or highway has been laid out, leading from Brooklyn Township to Cleveland Township, crossing the river at this place; and it also appears, that in 1820, the legislature passed an act authorizing Noble H. Merwin and Josiah Barber to build a bridge across the river, within limits, which include the point where the defendants are erecting their work. They did not avail themselves of the benefit of this act, and a temporary free bridge was afterwards built at the same place. In 1828, another act was passed authorizing a company to erect a toll bridge across the river at some place between Vineyard Lane and the entrance of the Ohio canal. These acts contribute very strongly to show that the legislature do not consider the erection of a bridge, as *per se* an obstruction to a river: they go further, they show that they did not consider it an obstruction at this particular point. If this reasoning could by possibility, be deemed not to be legitimate, then these various acts must at any rate, be regarded as a repeal, so far as regards the subject matter of this suit, of the statute of 1817. At a still later period, in 1832, an act was passed authorizing the erection of a bridge higher up, across the river, and in that act is contained this proviso, "that nothing herein contained shall be so construed as to prevent the repairing, keeping up and using the floating bridge which is now in use, nor to prevent the building another in its stead." The company which had been created

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in 1828, relinquished their right to the public in 1829; a floating bridge was then built by subscription, and maintained by the county commissioners, from whom these defendants, in 1836, obtained permission to build a drawbridge. Taking all these circumstances together, if they do not amount to a positive declaration on the part of the legislature, not only that a bridge, but that *this* bridge, would be a lawful erection, and if they do not, *prima facie*, show the acquisition of a right on the part of the defendants to build, I do not know what will have this effect.

But inasmuch as the complainants purchased property on the river in the expectation that the navigation would not be obstructed, it may be necessary to examine the testimony still further, in order to see whether the whole result of it will at all vary the conclusions to \*which we have been hitherto justified in coming? Here, how- [60] ever, very little satisfaction is to be gained. There is an irreconcilable conflict in the testimony which has been taken. The witnesses on the part of the complainants are generally of opinion that the proposed work would be an injury to the navigation, while those who testify for the respondents are almost equally unanimous in a contrary belief. For instance, John Haggerty says that a wind blowing from the lake, and which will enable a vessel to enter the harbor, will carry it half a mile above the bridge, and he is sustained in this by three other witnesses, while on the other hand they are all directly contradicted by several witnesses whom the respondents have examined. So on the question whether there will be sufficient room below the bridge to transact all the shipping business, there is the same diversity. John Sims and several others think there will be, and give as one reason, that the Cuyahoga River below the bridge is larger than the harbor at Buffalo. In like manner the witnesses on the part of the complainants, believe that the warehouses and other property owned by them, will be much diminished in value, while on the other hand those on the part of the respondents are equally confident that that property would be rendered even more valuable than it is, if the proposed bridge were built. Some of the witnesses not only testify that the bridge would not be an obstruction, but that it would even assist the navigation of the river, since it would afford a place for vessels to make fast their warping line to. It is vain and needless to trace the difference of opinion which runs through nearly all the testimony: but it is easy to see that it presents a complete obstacle to the extraordinary relief which is sought in these bills.

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There is no circumstance in the administration of justice, which is more striking than the contradiction which is discovered, not occasionally, but constantly, in the testimony of witnesses. Every belief which witnesses have concerning even what are called matters of fact, is necessarily made up of a judgment as well as of a direct perception. So far as the last is concerned, every one may be impressed alike; but there is no testimony, however plain and simple it may be, which does not require a great variety of judgments to be formed, in order to render it at all intelligible to the person delivering it in the first instance, and to those to whom he communicates it afterwards. The mind is so accustomed in the common affairs of life, to form these judgments with instantaneous rapidity, and they are at the same time so numerous, and so minute, that they entirely escape our observation; and we suppose that we are only seeing an object, when in addition to that, and in order to see it, we are really forming a great multitude of judgments! And as our judgments depend upon our faculties, which are so various, and so variously used, the extreme contradiction which is met with in the testimony of witnesses is not an unaccountable fact at any rate. There is no part of the testimony in these cases which does not afford illustration of these remarks. Witnesses are examined as to a fact of some importance, whether there is any shipping business of importance transacted above the bridge; for if there is not, the bridge would not be an obstruction. Some of them testify that business of that character is transacted above the bridge, while others testify that it is the rarest thing imaginable for vessels to move up above that point; that if they do, they are warped up, and never sail up, and it is only for the purpose of being over-hauled or repaired, or for the purpose of laying up during the winter. With regard to the bridge, some of the witnesses think that the draw which is proposed to be constructed, will obviate all difficulty as to the passage of vessels, and others are of a directly contrary belief. It is evident what a multitude of judgments and reasonings are involved in the simple examination with regard to this one matter, and what room there may be for the greatest variety of opinion.

There is another circumstance equally entitled to observation with the one I have just noticed—it is that, when testimony the most discordant imaginable, and tending to totally different results, has been delivered, has had its effect, and a judgment, as must necessarily be the case, has been pronounced upon one side or the other, all the difficulties which had been anticipated in practice, begin to disappear.

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Things are seen in a different light from what they were before, which alone occasioned such a difference of judgment; and the parties frequently find that their interests, which were believed to be absolutely contradictory, are not only reconcilable, but acquire strength from their alliance. The circumstance which occasioned a difference of opinion and a supposed conflict of rights, disappears. Minds which before saw things differently, now see them alike.

But the complainants have relied upon the ordinance of Congress of 1787. The various acts of the state legislature which have been referred to, as giving a construction to the term navigable river, or as limiting its meaning in practice, are not here of the same importance as under the first branch of the case. The right now to be considered, is one which affects the authority of the general government, as well as that of the state; and it would not be safe to rely upon a \*pre [62] sumptive evidence of intention, contained in a number of local acts, as furnishing an absolute rule of interpretation. And yet when it is considered, that the lawfulness of those acts has never been questioned by the federal authority; that since the foundation of the state, its legislature have authorized bridges to be erected over the largest streams, the argument drawn from acquiescence is not without force: and when it is also remembered, that Congress have given donations to the state to aid in the construction of its canals, after it was known that in the prosecution of the work, some of the widest streams were crossed by draws and aqueducts, the argument from acquiescence is still further fortified.

The ordinance consists of two parts; first, of a constitution of government for the then territory; and secondly, of articles of compact, which were intended to look beyond the period when the people should emerge from their territorial condition, and become members of the union. I have called this part a compact, because it is so termed in the instrument: but if it were not for some things which have since taken place, there might be great difficulty in regarding it in that light. There was in reality but one party to it originally, and that was the general government. But when application for admission into the union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted by the United States as one party, to the state, as the other. This seems to show, that the people of Ohio have, so far, treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the imme-



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diate formation of a state constitution, and were of no importance, if the state should have a right to annul the ordinance the moment it assumed that condition. The state may thus, by its own act, have converted that into a compact which was before only a fundamental act of Congress.

But what is the true meaning of that clause which declares the free navigation of our rivers. Its language is this: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

When the ordinance was framed, the articles of confederation were in force. This instrument provided for the admission of Canada into [63] \*the Union, but it was entirely silent with regard to the formation of any other new state. It gave no power to organize new states within the bounds of the confederacy. The consequence is, that any new communities which may have sprung up, by whatever name they may have been called, would have been mere dependencies on, and not integral parts of the confederacy. The act of cession by Virginia, six years later in date, for the first time provided for the creation of new states, having all the powers of the original states. But for it, the legislature of the Union may have exercised an unlimited control over those communities. The articles of confederation afforded them no security. Congress may have passed laws affecting the navigation of their rivers, and have imposed duties on the commodities transported on them. And the inference which I think we are now justified in making is, that the clause in question, so far as it regards the people of the territory, is a guarantee to them against the interference of Congress; that it is, in other words, a limitation on the power of the general government, and not a prohibition to the new states. For the clause in question consists of two parts, which are very distinct from each other, not merely because the language is different, but because the subject matter in each is of a different character. The first assures a free navigation to the people of the territory, and the second to the people of the other states. It is impossible to admit that the first imposes a restraint upon the legislation of the new states, without doing violence to the act of cession, and to the ordinance itself, both of which declare that those states should be admitted to a share

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in the federal councils on an equal footing with the original states. It is plain that the construction contended for, would involve a manifest inconsistency between different parts of the ordinance, and would permit a direct encroachment on the acknowledged powers of those new states.

If this part of the clause is too vague to admit of this construction, then the only other interpretation which we are permitted to give it, is, that it forbids the states to be formed out of the territory from regulating their internal commerce, or from imposing discriminating duties on persons who should be citizens of one or more of those states, and not citizens of the state passing such laws. The words "states afterwards admitted into the confederacy," which occur in the latter part of the clause, was not sufficient to denote this intention, inasmuch, as there might be, and actually have been, several new states created, which were not included in the north western territory.

\*But if I should be mistaken in endeavoring to give a just and [64] sensible interpretation to this part of the clause—if it does undertake to prohibit the northwestern states from passing laws affecting the navigation of their rivers, then it might become a question whether such a provision was not, *ipso facto*, abrogated by the constitution of the United States; for the people of a state have not even the right to cede to the government of the Union any of those powers which appertain to its domestic jurisdiction, and which go to make up the idea of a distinct state. It would not only subvert the authority of the state, but would also disturb the necessary balance between the federal and local governments. It will be observed, that the section immediately preceding the "articles of compact," declares, that they are adopted, among other things, to ensure the admission of the new states to a share in the federal councils on an equal footing with the original states: and the last article but one of the compact, provides that they shall be admitted on an equal footing with the original states in all respects whatever. To suppose that the author of that instrument intended to spoil the work of his own hands, by mutilating the just authority of the state governments, would be, to say the least, unreasonable, and I have therefore preferred to put such an interpretation upon it, as is at once natural and consistent. The remaining part of the clause, which relates to the citizens of the United States and to those of other states does contain a prohibition on the states of the territory; and its true sense and intention may be gathered from the history of the country prior to that time. At a very early period,

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even during our colonial condition, the citizens of different parts of the country were greatly harassed by the interfering regulations of the local governments. A difficult controversy once existed on this subject, between Connecticut and Massachusetts. The former state commanded the mouth of the Connecticut river, and imposed duties on boats from Massachusetts. And Massachusetts, in retaliation, laid an impost on all commodities exported to or from Connecticut. The New England confederacy, as it was termed, was in existence at that time, but it was not armed with sufficient authority to prevent these collisions. There was no period prior to the adoption of the articles of confederation, which did not attest the same spirit of hostile legislation among the colonies. Their alienation from each other was so extreme, that Dr. Franklin at one time doubted whether they would ever be able to form anything like a permanent union. The articles of confederation, for the first time, established that salutary regulation re-  
65] garding the intercourse of the \*different states, which declared that "the free inhabitants of each state should be entitled to all the privileges and immunities of citizens in the several states. He who framed the ordinance, was familiar with the difficulties which gave rise to the insertion of this provision, and he determined to carry its whole spirit into the ordinance.

It was uncertain where the boundaries of the new states would be, but it was very probable, that some of the rivers of the territory, would traverse more than one of them. It was the intention of the ordinance, first, to restrain a state from obstructing the navigation of a river to the injury of the inhabitants of another state, into or from which it passed; and in the second place, to prohibit all discriminating duties on citizens of other states, on any river, whether it run through several states, or was contained in the limits of the single state which attempted to impose such duties. This was effecting precisely what was effected by the constitution of the United States, which was in agitation at that very time, and was adopted two years afterwards. That gives to the citizens of each state, all the privileges and immunities of citizens of the several states, and in addition, clothes Congress with the power of regulating the commerce among the states. The principles of the new constitution, (as it was uncertain whether it would be adopted,) were carried into the ordinance. But to suppose that it was intended to restrain the state from passing laws affecting the navigation of rivers, which lay exclusively within its own limits, by authorizing the building of bridges, dams, or aque-

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ducts, can not be admitted, because it would, to say the least, be a palpable departure from those principles. That a state should wantonly clog the navigation of its streams, to the permanent injury of its own people, is not to be supposed. It is one of those events which no legislator would think of providing against, any more than he would against suicide. Or, if such a thing may be supposed, then it is clear, that the restraint can not be imposed in this instance, without invading the appropriate sphere of state jurisdiction.

He who framed the ordinance, had a difficult and delicate task to perform. The people of the United States were then living under the articles of confederation. What should be the exact limits between state and federal authority, what the relative powers of the two species of government, were questions deeply and extensively agitated, and therefore not yet settled. And still more undetermined was the question what should be the relative attributes and authority of states \*whose existence was not provided for even in the articles of con-[66 federation.

This will account for the very singular fact, that not only does the ordinance establish a constitution for the territory, but some of the leading features of a constitution in embryo are marked out for the new states, when they should be admitted into the Union. An attempt of this kind would never have been thought of, if the constitution of the United States had then been adopted. Fortunately these outlines were conformable to the great principles of freedom, were copied from the constitution of other states, and were precisely the elements of government which the people desired to establish: otherwise, I do not know what would have become of them, when the states were admitted into the union under the constitution.

The conclusion to which I have come is, that the clause in the ordinances contains a limitation on the power of the general government, as well as a prohibition to the states. Or if it is not divisible into two distinct parts, that then it contains throughout a prohibition to the states; that this prohibition restrains these states from passing laws which should have the effect of regulating its commerce with other states, or from imposing discriminating duties on the citizens of other states, but does not prevent them from legislating concerning rivers which run exclusively within their own limits, when their own citizens, equally with the citizens of other states, are subjected to any inconvenience or disability which may flow from that legislation.

There is, in reality, no remaining question to be examined. For al-

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*Lessee of Avery v. Pugh.*

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though I have considered the case as leading to a third division, yet if the question of private injury to the property of the complainants, is itself dependent upon the fact, whether the navigation of the river will be obstructed, and there is not evidence under either of the first two branches that it will be, every ground upon which the complainants ask for relief is taken away.

Bills dismissed; but on the application of the complainants, an appeal was allowed to the Supreme Court of the United States.

WOOD, J. being related to a party in one of these suits, did not sit during the trial of either.

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**67]****\*LESSEE OF HENRY AVERY v. JOHN PUGH.**

Under the act of 1816, regulating the duties of executors and administrators, the court granting letters had the same power to direct the sale of real property of the decedent, lying in any other part of the state, as in the county where letters were granted.

An administrator can only sell his intestate's real estate to pay debts upon the express order of the court, after they have ascertained the necessity of such sale.

**EJECTMENT**, for ninety acres of land in township two, range six. From Montgomery. The case is submitted to the court upon an agreed statement of facts, showing that both parties claim title to the land in dispute under Daniel Symmes. Symmes died before the year 1818, seized in fee. In 1822 his heirs conveyed to Avery and Nicholas Longworth, and Longworth afterwards conveyed his interest to Avery. Symmes resided in Hamilton County at his death, and administration on his estate was granted in that county. Proceedings were had in that county to subject his real estate to sale for the payment of debts, under which the defendant, in 1819, became a purchaser, received his deed, and has ever since been in possession. These proceedings are admitted to have been apparently correct.

HOLT, for plaintiff.

STODDARD, ODLIN, and SCHENCK, for defendant.

By the Court, HITCHCOCK, Judge. From the agreed facts in this case, it will be seen that the premises in controversy, being situate in

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the County of Montgomery, were sold in pursuance of an order of the Court of Common Pleas of Hamilton County, for the payment of the debts of Daniel Symmes, who died seized of those premises. And the only question raised and discussed by the counsel is, whether that court had so far jurisdiction of the subject matter as to possess the power to order such sale. It seems to be admitted, that if the court possessed the power, then there is an end of the case, and judgment must be entered for the defendant.

The position assumed by the counsel for the plaintiff, is, that the Court of Common Pleas, whether acting as a court of common law, of chancery, or of probate, is a court of limited local jurisdiction, and can not take cognizance of matters without or beyond that local jurisdiction. This, to a certain extent, and as a general rule, is correct. It must exercise its jurisdiction within the appropriate county, but when that jurisdiction has been exercised, the effects are not always limited to the county, or even to the state. A judgment recovered in one county, if the court had jurisdiction, is conclusive of the [68] rights of the parties, not only in that particular county, but throughout the state and throughout the United States, and perhaps throughout the world.

The Court of Common Pleas is created by the constitution, and its jurisdiction, in part, defined by that instrument; but it is left principally to subsequent legislation to ascertain the extent of its jurisdiction, as well as the manner in which that jurisdiction shall be exercised. The first section of the third article of the constitution prescribes, that "the judicial power of the state, both as to matter of law and equity, shall be vested in a Supreme Court, in Courts of Common Pleas for each county, in justices of the peace, and in such other courts as the legislature may, from time to time, establish." The fifth section of the same article provides, that "the Court of Common Pleas in each county, shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law." Acting under the constitution, the general assembly have, from time to time, passed laws regulating the practice of these courts, defining their duties and ascertaining their jurisdiction. In this legislation, however, the common law, chancery, and probate jurisdiction, has been described in different statutes. Each jurisdiction has been kept separate and distinct. To the constitution, then, and to the laws made conformably thereto, we

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must look, in order to ascertain the extent of the jurisdiction of our several courts.

As before remarked, the Court of Common Pleas is a court of limited local jurisdiction. In other words, it must exercise its jurisdiction in its own appropriate county. But the law authorizes a change of venue, and by such change the jurisdiction is transferred to a tribunal having no original jurisdiction of the case, but which, by the change and the law under which it was made, acquires jurisdiction. And notwithstanding the locality of the jurisdiction of the Court of Common Pleas, still when a judgment is once rendered by that tribunal, that judgment may be enforced by execution issued to any other county of the state. This is not because the jurisdiction of the court is co-extensive with the state, but because the policy of the law requires that the property of a debtor, wherever located within the state, should be subjected to the payment of his debts. The same reason would operate in case of insolvent estates of deceased persons. The Court of Common Pleas of the county in which the deceased had his last place of residence, have not only jurisdiction to appoint, but it is their duty to appoint administrators on his estate. 69] All the estate of \*the decedent is made assets for the payment of his debts, the personal estate first being appropriated. The real estate can not be appropriated without an express order of the court after having ascertained the necessity of such appropriation. How does the court acquire the jurisdiction to make this order? Not from the fact that the land lies within the county, but from the fact that they appointed the administrator, and have a supervisory control over his actions until the estate is settled. And there certainly can be no more impropriety in permitting an order of sale to be executed in a distant county, than there is in permitting an execution issued upon a judgment of the same court sitting as a court of law, to be enforced in a distant county.

But unless, by a fair construction of the statute in force at the time this order was made, such effect can be given to it, the title of the defendant must fail.

Before proceeding to a particular examination of this statute, it may be well to refer to the case of *Ludlow's heirs v. M'Bride*, 3 Ohio, 240, which is cited by the counsel for the plaintiff as an authority in point. In that case the premises in controversy were situate in Butler county, and had been sold in pursuance of an order of the Court of Common Pleas of Hamilton county, acting as a court of probate. The

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court decided that the court of Hamilton county had no jurisdiction to make the order, and that the sale was consequently void. There is much similarity between the case above referred to and the case before the court; and had there been no change in the law, it would have been an authority in point. But the law in force at the time of the sale to M'Bride has been long since repealed. This was "a law for the settlement of intestates' estates," adopted from the Pennsylvania statutes, and published June 16, 1795. In the seventh section of this law, provision is made authorizing the administrator under certain circumstances to sell the real estate of his intestate, but it is only such real estate "as the orphan's court of the county, where such real estate lies, shall think fit to allow, order and direct, from time to time." This law continued in force until 1805, and was then repealed. And from the first of June, of this latter year, until the first of June, 1808, there was no law in the state, subjecting real estate to sale for the payment of the debts of a decedent. Since this latter period, however, all the estate of a deceased person, with some trifling exceptions, has been assets in the hands of an administrator for the payment of the debts. Such is the policy of the law, and \*in con- [70] struing the several statutes on the subject, this policy should be kept in mind.

The law in force at the time the premises in controversy were sold, is the act of the 25th January, 1816, entitled "an act for the proving and recording wills and codicils, defining the duties of executors and administrators, the appointment of guardians and the distribution of insolvent estates." Ch. St. 929.

It is insisted by the counsel for the plaintiff, that inasmuch as there is no express provision in this statute, that the court of Common Pleas, granting letters of administration, should have power to order the sale of real estate, situate beyond its local jurisdiction, therefore that an order so made, is *coram non judice* and void. It is true that there is no such express provision, and it is equally true, that there is no express provision that the court shall have power to order the sale of real estate within its local jurisdiction. But there is a provision that any part or the whole of the real estate of a deceased person, shall be sold for the payment of his debts, if the same be necessary. Although such is the provision of the statute, no reference is made to the locality of the estate to be sold until we arrive at the thirty-eighth section of the act. By this section, administrators appointed in other states, are authorized to sell the property of their intestates, situate



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in this state, provided such sale be necessary for the payment of debts. In such case the order of sale must be made by "the court of Common Pleas in the county where the property lies."

There can be no controversy but that it was the intention of the legislature by the act of 1816, that *all* the estate, both real and personal, of a deceased person, should be liable to the payment of his debts, and it is equally clear that it was not their intention that real estate should be sold without an order of a court of Common Pleas. The question is *what* court of Common Pleas possessed the power to make the order?

The twenty-third section of the act provides "that when any person dying intestate, shall have real or personal property to the amount of one hundred dollars, the court of Common Pleas in the county *wherein such intestate had his last place of residence* shall grant letters of administration." This section unquestionably refers to the appointment of administrators upon the estates of such persons as had died residents of the state, for in the forty-eighth section, provision is made for the appointment of administrators upon the estates of persons dying in other states, having property in this. But where the [71] deceased had been a resident of this state, then \*the court of Common Pleas of the county in which he had his last place of residence, had the sole jurisdiction to grant letters of administration.

Letters of administration being granted, it is next made the duty of the administrator to give bonds with sureties, to the satisfaction of the court, and take an oath faithfully to discharge the duties of his appointment. It is further his duty to procure the personal property of the estate to be appraised, by appraisers appointed by the court, and to return a true and accurate inventory of the same, together with a schedule of the debts due the estate, so far as known, "to the clerk's office of *said* court within three months." It is next made the duty of the administrator, provided such sale be necessary, to sell the personal property at public vendue, and "in all cases of the sales of the property of the deceased, return a true and accurate statement of the same, to the court or clerk's office as aforesaid." He is then to pay the debts of his intestate, and if there be any of the avails of the personal property remaining after the payment of all debts, the same is to be distributed to the widow and heirs of the deceased, as prescribed in the law. Of all this return must be made to the court.

In the thirty-third section, it is provided "that if on return made to the court, it shall appear to their satisfaction, that after deducting

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the widow's wearing apparel, one bed and bedding, the expense of the last sickness, funeral charges and the cost of administration, there is not personal property sufficient to pay all the demands against said estate, they shall, after setting to the widow her dower, direct the administrator or administrators to sell so much of the real estate of the deceased as shall be sufficient to discharge all such demands, after the sales of personal property has been applied thereto, etc." The mode of sale is then pointed out, and the court are authorized to require additional security of the administrator that the avails shall be faithfully applied.

"If on return made to the court." What court is here referred to? There can be but one answer to this question. It is the court spoken of in the preceding sections of the act. And the only court before spoken of is the court of Common Pleas of the county in which the intestate had his last place of residence, and which granted the letters of administration. This is the court to which the administrator must make all his returns, from which he received his authority, and with which he must effect his final settlement. And the same court to which return is made, is empowered to order the sale of real estate if such sale is necessary. And no other court but this is referred [72 to in the act in connection with the sale of lands, except in the thirty-eighth section before referred to. Such we take to be the clear interpretation of the act, and any other construction would defeat the intention of the legislature.

Upon the facts agreed, the law is with the defendant, and judgment must be entered accordingly.

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 LESTER CLARK v. CALEB KEITH.

In replevin for several articles, where the jury find for the plaintiff, as to part of them, and for the defendant as to part, assessing to each the proper damages, separate judgments will be entered in favor of each, with full costs.

REPLEVIN. From Huron. The plaintiff replevied three stacks of hay and thirty-five bushels of corn in the ear standing on the ground. The defendant pleaded, 1. Non detinet. 2. Property in himself, derived through a constable's sale. The jury returned the following verdict. "That at the commencement of the suit, the right of posses-

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sion and the right of property in and to the three stacks of hay in said declaration mentioned, and in and to twenty bushels part and parcel of the corn therein also mentioned, were in said Lester Clark, and they assess his damages by reason of the premises, at five dollars. And the jury do further find, as to the rest and residue of said corn, viz. the quantity of five bushels, the right of possession, and the right of property, at the commencement of the suit, were in the defendant, and assess the value thereof at two dollars and fifty cents, and his damages at one dollar." The counsel for the plaintiff moved for judgment against defendant, for the damages assessed against him with full costs, but the questions arising on the verdict were reserved.

N. NEWTON, jr. for plaintiff, thought the right to recover costs depended upon the pleadings. The defendant having put in issue the *whole* property replevied, when he should have so pleaded as to separate his own from the plaintiff's property. The plea being found false in part, is bad in toto. Where the whole property is put in issue, as in the plaintiff, if he recover at all, recovers full costs. 4 Mass. 614.

No argument for defendant.

**73]** \*By the Court, Wood, Judge. Our replevin act, 3 Ch. St. 1723, § 7, 8, provides, that in all cases where issue is joined in replevin, and the jury shall find for the defendant, they shall also find whether the defendant had the right of property in the goods and chattels, or the right of possession only, at the commencement of the suit, and if they shall find either in his favor, they shall assess such damages as they may think right and proper for the defendant, on which, *with costs of suit*, judgment shall be rendered by the court. But if the jury find for the plaintiff on the issue, they shall assess adequate damages to him for illegal detention of the property, for which, *and the costs*, judgment shall be rendered for the plaintiff. In this case both parties seem to be within the letter and spirit of the act of Assembly, and entitled to costs, for each has an assessment of damages in his favor, and we see nothing inconsistent with general principles, in awarding costs to each. The precise question was decided in Massachusetts, in 1809, *Powell v. Hinsdale*, 5 Mass. 343. In that case the jury found part of the chattels in the plaintiff and part not, and the court said, that in replevin, *each* party might be an actor, and if the plaintiff prevailed he should have damages for the caption and detention by the defendant, but if the defendant prevailed, he should have a return of the goods, and damages for the taking on the writ, with costs. In

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which case each party would be considered as prevailing, and as each had judgment for damages, he must also have judgment for costs. We consider the same rule applicable to this case. Judgment will therefore be entered for the plaintiff, for five dollars and costs, for the defendant for three dollars and fifty cents and costs.

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WILLIAM DAVISON v. JAMES WOLF AND WIFE, AND OTHERS.

Under the following will: "I bequeath to my wife my real estate, in order to raise my younger children, to have it as long as she continues my widow, but if she ceases to be my widow, I wish it not to be disposed of until the youngest child becomes of age," no partition can be made among the residuary devisees until the majority of the youngest child, although the widow's estate may have become extinct.

CHANCERY. From Pickaway. Edward Davison died in 1827, seized of the lands in controversy, leaving a widow, now the defendant, Mrs. Wolf, seven children by a former marriage, and five children by the last marriage. The plaintiff is one of the earlier children, and having acquired the interest of the other six elder children, \*seeks [74 by this bill, a partition of the land. Averring that the widow and her husband have forfeited the estate by waste, he also demands an account of rents and profits.

The waste proven, consists in clearing and improving a plantation of wild land, and burning the logs of some old cabins for firewood; and was thought by the court undeserving of further notice. The answer and evidence present the question whether the estate of the widow and devisees have not so determined, as to leave the plaintiff a right of partition.

The will of Edward Davison, after some small legacies to his eldest children, bequeaths his property, as follows: "I will and bequeath to my wife Elizabeth, after all my debts and funeral expenses are paid, all my personal property and real estate, in order to raise my five (younger) children: I wish her to have all this property so long as she continues my widow, but if she discontinues my widow by reason of death, I wish the property not to be sold, or disposed of, until my son Edward Davison becomes to the age of twenty-one, then I wish my property to be equally divided between my first named children,

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and my last named children." Edward Davison, the devisee, will not be of age until 1847.

GREEN and OLDS, for the plaintiff, contend that the will only devises to the wife a life estate upon condition she remains a widow ; and by marrying again she has determined her estate. As to the trust for the benefit of the five younger children, there is no difficulty. The object of the testator was two fold, the benefit of the *widow* as such, and the raising the children. The widow has ceased to be such, and the children are raised, so far as to be no longer a charge. The provision in the will, forbidding the sale of the property in case of the widow's death, until the youngest child came of age, was designed to secure them the means of subsistence, when unable to earn it. The devise to the widow was expressly for raising the children, but upon condition she should not marry again. The trust in favor of the younger depended, upon the event of her dying the widow of Davison; which is rendered impossible by her intermarriage with Wolf.

J. D. CALDWELL, for defendants, contended that the condition of the devise to the widow, the raising of the children, amounted to the full value of estate, and inasmuch as she and her husband had faithfully performed the condition, they were to be regarded in equity as **75**] \*purchasers for a meritorious and valuable consideration, of an estate during the life of Mrs. Wolf. The design of the testator evidently being to place the estate beyond the interference of the elder children during the life of his widow and the minority of her children. There is also a trust for the education and support of the younger children, until the youngest is twenty-one years old, which can not be defeated by their mother's marriage, but will be protected by the court. 2 Munf. 234 ; Saund. on uses, etc. 349, 351 ; 3 Pr. Wms. 215 ; 2 Atk; 406.

By the Court, LANE, C. J. The plaintiff insists, that by the marriage of Davison's widow to Wolf, in 1828, her estate under the will ceased, and that the land became subject to distribution among the residuary devisees. To sustain this position, it is necessary to give such an interpretation to that instrument, that not only the widow's estate is determined by the marriage, but that no other estate was interposed by the donor, between it and those who hold the remainder.

The common principles of the construction of wills, requires courts to search for the meaning of a testator, without regard to the form he

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adopts to express it, and to give effect to that intention, if consistent with the policy of the law. It is evident here, that the object of the testator was to provide for the nurture of his youngest children, by keeping the estate undivided for their benefit, until the youngest became of age. To this end he gave the land to his wife during her widowhood, *to raise them*; and when her estate should be ended by her death, he directed it to remain *undisposed of*, during their minority, evidently as a provision for them. Admitting, then, for present purposes, that the estate of the widow was extinguished by her marriage, the specific object of the testator, in providing for the nurture of his younger children, can not be carried into execution, without creating an estate, in those depending on the contingency of the falling in of the widow's interest, before the youngest child became of age. Viewed in this aspect, the relations of the devisees were: a conditional freehold for the life of the widow; a contingent remainder to all the younger children in fee. Whether the contingent estate in the younger children, be at law or in equity, is of no moment in this suit in chancery; either is equally destructive of the plaintiff's claim for partition.

Bill dismissed.

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**\*HENRIETTA TOWNSHIP v. BROWNHelm TOWNSHIP. [76**

In order to gain a settlement under the law for the relief of the poor, the domicile must be clear, notorious, and continuous.

**DEBT.** From Lorain. Suit to recover compensation for the support and maintenance of Samuel B. Wilgus, a pauper, claimed to be an inhabitant of Brownhelm. The case came on to trial before a jury in Lorain County upon the general issue.

On the trial of this case it was proven that Samuel B. Wilgus, then an infant, from the year 1829, until late in the fall of 1834, was occasionally in the township of Brownhelm, but had there, within that time, no fixed residence. That late in the fall of 1834, and after the close of navigation upon Lake Erie, he took boarding at the house of one Parsons, in Brownhelm. During the subsequent winter he was in this township, not to exceed one-half of the time, and the residue of the time, was in the adjoining and neighboring townships. Upon the opening of navigation in the spring of 1835, he left and was absent

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upon the lake until late in the fall of the same year. During this absence, he left at the house of Parsons, a box and some small articles of clothing, and in two instances visited the house himself, but did not stay to exceed one day, at each time. At the times of these two visits, he took away some small articles of clothing and left others. After the close of navigation in the fall of 1835, he again returned to the house of Parsons, and was there, as testified by one of the witnesses "off and on," until the March following, when he left entirely, and did not return until brought back by the overseers of the poor of the township of Henrietta, in September, 1836. Wilgus was an unmarried man.

By consent the jury returned a verdict for the plaintiff, subject to the opinion of the court, and assessed his damages at one hundred and forty-four dollars and fifty cents.

TIFFANY for the plaintiff, and ROOT for defendant, submitted the case without argument.

By the Court, HITCHCOCK, Judge. The only question for determination in this case is, whether Samuel B. Wilgus, the pauper, had acquired a legal settlement in Brownhelm, prior to March, 1836. The mode of acquiring such settlement is, by "residing one year in any township of this state, without being warned by the overseers of the poor for said township to depart the same; or three years after 77] \*having been once so warned, without being again warned as aforesaid." 29 O. L. 320. It is not pretended that Wilgus had ever been warned to depart from the township of Brownhelm; of course, if before March, 1836, he had resided in that township one year, he had gained a legal settlement. In order to gain such settlement, however, I apprehend the residence must be *continuous*. It will not suffice that a person shall have been in a township four months in one year, four months in another, and four months in a third. The residence must have continued for one entire year from the time of its commencement. In saying that the residence must be continuous, I would not be understood as intending that a person may not be occasionally absent, provided the intention to return be open and manifest. As if, for instance, an individual should go into a township, purchase property and take up his residence, or having a family, should, with his family take up his residence in such township, in either case a settlement would be gained at the end of the year, although the individual might have been absent for days or weeks.

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The residence must not only be *continuous*, it must also be *open and notorious*, and attended with such circumstances as to lead the authorities of the township in the exercise of proper vigilance, to the conclusion that there is an intention to gain a settlement.

In the case before the court, it appears that Wilgus, the pauper, was an unmarried man. In the fall of 1834, and after the close of navigation upon the lake, he took boarding at the house of Parsons, in Brownhelm. Previous to that time, if not afterwards, he appears to have been a transient person, having, so far as we know, no fixed place of residence. From the fall of 1834, to the following spring, he resided in Brownhelm, not to exceed one-half the time, and the balance of the time was in the adjoining and neighboring townships. Upon the opening of navigation in the spring of 1835, he left the neighborhood, and continued absent until its close, late in the fall, with the exception of two occasional visits, not exceeding one day each. True, he left at Brownhelm a small box with some few articles of clothing, but there is nothing to show that this was a fact of general notoriety, or that it came to the knowledge of any of the township authorities. From the close of navigation in the fall of 1835, until 1836, he was "off and on" at Brownhelm and in the neighborhood.

In the opinion of a majority of the court, these facts do not prove such *continuous, open and notorious* residence as is necessary under the statute to entitle a person to a legal settlement.

\*The verdict, therefore, must be set aside, and a judgment entered for the defendants. [78

WOOD, J. dissented.

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JACOB SOOK'S ADMINISTRATOR v. GEO. FRIEND'S ADMINISTRATOR.

In a suit upon a lost sealed obligation, chancery has concurrent jurisdiction with a court of law, where discovery as well as relief is sought.

A court of law is inadequate to secure the obligator of a lost instrument from indemnity against its recurrence, but chancery is adequate.

IN CHANCERY. From Richland. The case made in the bill and substantially proven, shows:—That in 1807, Friend\* gave his sealed note to Sook for seventy-five dollars, payable in nine months or a year,



## Sook's Administrator v. Friend's Administrator.

the parties then residing in Pennsylvania. Before the note matured, Friend moved to Ohio, without Sook's knowledge. In 1829, Sook discovered the residence of Friend, and came to Ohio and demanded payment. Friend admitted the debt and promised to pay, but soon after died, leaving assets more than sufficient to pay his debts. The bill has been accidentally lost, and though frequently demanded has not been paid. The bill seeks discovery and payment.

T. W. BARTLEY, for the plaintiff, cited the following cases: 1 Story Eq. 97, 8, 101; 1 Foub. Eq. 16, 17; 1 Ves. 341; 6 Ves. 812; 7 Ves. 20; 16 Ves. 430; 7 Barn. and Cres. 90; 2 Sim. 285; 2 Hill Ch. 371, 373; 4 Rand. 541; 3 J. J. Marsh. 73, 288, 300; 6 Mon. 140; 2 Bibb, 556; Wright, 526; 1 Yeates, 344; Gilm. D. C. 562; 5 Ohio, 126; 2 Wash. C. C. 514; 3 Do. 404; Wal. C. C. 66.

J. PURDY, for defendant, cited 1 Har. Ch. 117, 18.

By the Court, WOOD, J. The respondent's counsel contends that inasmuch as an action at law lies upon the note, this bill must be dismissed. This we think does not follow. Though a suit at law may be sustained upon a lost instrument, and the loss will excuse *profert*, yet it is well settled, that where discovery and relief are both sought, equity has *concurrent* jurisdiction with a court of law. Judge Story [79] holds the case of a lost sealed instrument one of the \*most common for equity interposition; and that one of the primary reasons for exercising this jurisdiction is, that no other court can furnish the same remedy, with all the limitations which may be demanded for the purposes of justice, by granting relief only upon the terms of the party's giving, when proper, a bond of indemnity, which courts of law can not require as a part of their judgment. 1 Story Eq. 97. There seems no necessity for the interference of equity now, upon the ground that courts of law will not excuse *profert*, because that rule has been so relaxed, as to admit an excuse for not making *profert*, in the place of *profert* although it deprive the defendant of oyer, 3 Saund. 151, 3, note. Another reason why chancery interposes in such cases, is to secure the defendant the benefit of the plaintiff's oath to the fact of loss. 1 Johns. Ch. 417. True, the loss may now be proven at law as well as in equity. But the necessity of requiring indemnity is sufficient to give equity jurisdiction; and the efforts in courts of law to afford analogous relief, by requiring an offer to indemnify, is not deemed adequate to secure the obligor. 1 Story Eq. 98; 6 Ves. 812.

Again the defendant insists the claim is stale and barred by the

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Ohio statute. We think otherwise. When Friend left Pennsylvania, no cause of action had accrued, and neither Sook nor his administrator are shown to have been in Ohio, until 1829. Until then, the plaintiff was "beyond sea," under the construction heretofore given to the statute of limitations in 1804, which was in force when this note matured. The statute had no effect on this contract until 1829, only eight years before the filing of the bill. But there is another reason, why the statute of limitations does not bar this recovery. In 1829, Friend not only acknowledged the debt, but promised to pay it.

We think the plaintiff entitled to a decree for the amount of his note with interest, but as no legal demand appears to have been made upon the administrator before suit, the plaintiff must pay his own costs.

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\*TOWN OF LEBANON v. THE COMMISSIONERS OF WARREN COUNTY.

An act of dedication, by the record of a town plat, of lots as "public ground" is presumed, in the absence of explanatory evidence, to be for a public square for the use of the town.

Neither a *subsequent* deed by the proprietors, nor their posterior declarations can affect the right.

The mere erection of a court house on a public square, and its occupation as such, is consistent with the use of the town; and when such buildings are abandoned, the town may reclaim its rights.

**BILL IN CHANCERY.** From Warren. Lebanon was laid out and a plat surveyed in September, 1802, the site then being in Hamilton county. The plat was acknowledged and recorded in October, 1803, after the county of Warren was created, including the town. Four lots (those now in controversy) were designated on the plat, "*public ground*," and as such are claimed to have vested in the county for *the use of the town*. In 1805, Lebanon was established the seat of justice of Warren county. In 1806, the commissioners of Warren county with consent of the town, erected a court house on one of the said lots, and afterwards a jail on another, which from thence were used by the county, and by the people of the town in public meetings, until 1834, when a new court house and jail having been erected in another

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part of the town, the courts, etc., were removed there. About this time, the county commissioners proposed to lease the site of the old court house for twenty years, to the highest bidder. The town claiming the exclusive use, bid in and took a lease, reserving the right to litigate the title of the county to "the public ground." The commissioners again proposing to let other parts of said ground on long lease, this suit is brought to restrain their proceeding, to secure the town in the free use of the ground, and to quiet their right as against the claims of the donors. The proprietors executed deeds to the commissioners in 1809. The facts are not controverted.

A. H. DUNLEVY and T. CORWIN, for plaintiff, cited 7 Ohio, 217; 6 Ohio, 304.

G. J. SMITH and J. PROBASCO, for defendants, cited 1 Ch. St. 291, 353; 3 Ch. St. 2099, 2232; 3 O. L. 255; 5 Ohio, 204; 7 Ohio, 88; 6 Pet. 507; 8 Ohio, 298, and relied upon the occupancy, and the deed to the county.

By the Court, LANE, C. J. The object of the bill is to prevent the commissioners of the county from selling or leasing certain lots in [81] \*Lebanon, claimed to have been dedicated to the town, by its original proprietors, as a public square, and to secure them to their public use.

The town of Lebanon was laid out by Corwin, Hathaway, and Hurin, in 1802, but the record of the plat was not made until 1803. On the plat the lots in question are designated as "public ground." The registration of the plat, by the operation of the statute of 1800, 2 Ch. St. 291, vests the fee of the land set apart for public uses in the county, to hold upon the uses intended by the donor.

The commissioners claim to hold the lots free from the trust as the property of the county, because they were conveyed to them by a deed of the proprietors in 1809, and because they have been occupied by the county ever since, in the erection and use of a court house and jail, and because, as they say, the lots were originally designed for this purpose.

The dedicating act in this case, was the registry of the town plat in 1803. The use was limited and took effect *then*; and a subsequent conveyance of the donors affects neither the trust nor the title. The words expressed in the act of dedication were "public ground;" a phrase which, in reference to a lot in a town, of shape, dimensions, and position suitable for this purpose, naturally, though not neces-

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sarily, means a public square. 6 Ohio, 298; 7 Ohio, 221. Where the words of dedication are ambiguous, the contemporaneous acts and declarations of the donors, and usage, may be adverted to, to explain them. 6 Ohio, 298; 7 Ohio, 88, 221. The testimony taken in this case, does not show with any certainty, that these words ought to bear a different interpretation. The subscriptions for the erection of a court house, made in 1805, but not paid until 1809, and the erection of the court house in that year, are probably too long after the grant to be employed to explain its meaning. The actual occupation of the lots by a court house and jail, is not inconsistent with *the use* of the property in the town; for the location of a court house and jail on a public square, transfers no property, but is an easement only, and the town may reclaim its rights, when the county occupation shall cease.

Remanded to the county for final decree, with leave to either party to take further proof.

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\*DOCTOR DUNN v. HENRY CRONISE.

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The declarations made by one offered as witness, can not be received to exclude him on the ground of incompetency, to deprive a party of the benefit of his evidence.

But such declarations may be received to impeach his credit.

ASSUMPSIT. From Seneca. The suit is upon a promissory note, made by Cronise to Samuel Leighton, and by him endorsed to the plaintiff. The note is for five hundred and thirty dollars, *with interest*, dated 8th of June, 1837, payable to the order of Cronise in six months. The defence is, that the note was given for real estate conveyed to the defendant by Leighton, and that since its execution and delivery to Leighton, the words, *with interest*, had been inserted in it, and testimony was adduced showing the fact. Leighton was then called by the plaintiff, for the purpose of explaining the alteration, and that it was done with his and Cronise's consent. The defendant then called witnesses to prove that they heard Leighton say he was interested in the note, and his offer to sell it. This was objected to, but admitted by the court, and the witness Leighton, was then rejected. The plaintiff submitted to a nonsuit, and now moves to open it up, because the court erred in the rejection of Leighton.

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\* A. L. RAWSON and C. L. BOALT, for plaintiff, cited 1 Stark Ev. 51; 5 Mass. 262; 8 Mass. 488; 4 M'Cord. 311; 1 Serg. & R. 130; 8 Am. Com. L. 517; 1 Blackf. 86, n. 2; 2 Ohio, 230; 2 Stark Ev. 757.

COFFINBERRY and STIVER, for defendant, cited 8 Mass. 438.

By the Court, GRIMKE, Judge. This is a question which we might suppose would have arisen very frequently; and yet very little is to be obtained from the English authorities. There are several American cases, however, in which the point has been directly made, although the determinations are by no means uniform. In *Calston v. Nichols*, 1 Har. & J. the declaration of a witness, that he was interested in the event of the suit, was admitted in evidence on an objection to his competency, and a similar decision was made in an anonymous case in 2 Hayw. 340, while in *Fernsler v. Carlin*, 3 S. & R. 130, it was held, that such declarations were not sufficient to exclude the witness. In *commonwealth v. Waite*, 5 Mass. 261, the same law was declared. It was said that the confession of a witness as to his in-  
83] competency, can not be admitted to disqualify him. \*In that case, however, the objection was not made at the trial, but discovery having been made of those confessions after the trial, a motion was made to set aside the verdict for that reason. A new trial is never granted for the purpose of affording an opportunity to impeach a witness. No notice, to be sure, is taken of this circumstance, and the decision is placed exclusively on the ground, that such declarations are inadmissible for the purpose of excluding a witness. In the still later case of *Cotchell v. Dixon*, 4 M'Cord 311, it was held, that the declarations of a witness, that he is interested in the event of a suit, are not *per se* sufficient to deprive the party by whom he is called, of the benefit of his examination. It was well said, that although there might be danger of allowing a witness to give evidence, when he is suspected of having an interest in the event of a suit, yet that sufficient security would be found in permitting the circumstances to be used on the score of his credibility. "The declarations of a party," it is said, "when they operate against his interest, are admitted on the presumption that he is best acquainted with his own rights, and judging from the known influence which interest exercises over the mind, it is a fair inference that he would not make such a declaration unless it was true." But there is no reason why the rule should be extended to the declarations of a stranger. We think the court erred in excluding the witness.

Nonsuit set aside, and new trial awarded.

**LESSEE OF JOHN HOLLISTER v. HENRY BENNETT.**

Previous to the year 1826, it was not necessary that the return of the collector of taxes on town lots, delinquent for the non-payment of county and township taxes, should be verified by oath.

**EJECTMENT.** From Wood. The plaintiff seeks to recover lot 315, in Perrysburgh. The case was submitted to the court in the county, who expressed an opinion in favor of the defendant. The plaintiff then moved for a new trial, upon the ground that the court mistook the law arising upon the facts of the case, and that motion is now before the court. As the facts of the case are fully stated in the opinion of the court, it is unnecessary to state them here.

COFFINBERRY and SPINK, for plaintiff.

WAY, BENNETT and CAMPBELL, for defendant.

\*By the Court, HITCHCOCK, Judge. The plaintiff claims title to [84] the premises in controversy, in virtue of a sale made by the collector of Wood County, for county and township taxes, on the 15th Dec. 1826.

This lot, in the spring of the year 1823, was listed by the township lister of the town of Perrysburgh, in the name of an unknown owner, and in conformity with the law then in force, was appraised at twenty dollars.

It was placed on the duplicate of county taxes for the same year, and charged with a tax of ten cents, being equal to five mills on the dollar. On the 15th of March, 1824, it was returned by the collector to the county auditor, delinquent for the non-payment of this tax. At the same time, other lots in the same town were returned delinquent. This delinquent list was not verified by oath.

In the spring of the year 1824, the lot was again listed in the name of unknown owners, and appraised at forty dollars. On the duplicate of this year it was charged with a tax of twenty cents, and also with the ten cent tax of 1823, amounting, together with a penalty of twenty-five per cent. on said ten cents, to thirty-two cents five mills. On the 1st of March, 1825, it was again returned delinquent, as before for the non payment of the taxes and penalty.

On the duplicate for the year 1825, the lot was charged with a tax for that year of twenty-five cents. It was also charged with the taxes of 1823-4, amounting for those two years to thirty cents, together

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with a penalty of twenty-five per cent. on said thirty cents, amounting to seven cents five mills, making in the whole, including the tax for the year 1825, sixty-two cents five mills. This same year, a township tax was assessed on said lot, of ten cents. Neither the county nor township taxes were paid, and on account of such non-payment, the lot was again, in March, 1826, returned delinquent. None of the foregoing returns of delinquency were verified by oath.

In the year 1826, the county auditor placed this lot upon the duplicate charged with the township tax for 1825, of ten cents, and penalty of twenty-five per cent., making in the whole twelve and a half cents, and with the county taxes for the years 1823-4-5, with penalties on the same of twenty five per cent., making in the whole sixty-eight cents seven mills, and amounting, including county and township taxes and penalties, to eighty-one cents two mills.

On the 19th day of December, 1826, these taxes still remaining unpaid, the lot was sold by the collector of taxes, to the lessor of the plaintiff, and on the 27th day of the same month, the collector made 85] \*return to the county recorder of the sale. This return was verified by oath, but in it the name of the purchaser was not specified. And on the same 19th day of December, the collector conveyed the lot to the lessor of the plaintiff, reciting in the deed that he was the purchaser at the sale for taxes.

Upon these facts the plaintiff relies as proving title in his lessor.

To this title the following objections are made.

1. It does not appear from the records of the auditor of the county as given in evidence, that the lists of delinquencies for the years 1823, 1824, and 1825, were sworn to by the collector.

2. It appears from the facts in the case, that the said lot was charged with and sold for a greater amount of tax, interest and penalties, than was actually due thereon.

3. The certificate or return of sale made by the collector to the recorder of the county, does not show to whom the lot was sold.

4. There is no sufficient evidence of the publication of the delinquent list.

Before considering these objections, it may be well to remark, that previous to the adoption of the *ad valorem* system of taxation in 1826, taxes for state and county or township purposes, have from the first organization of the state government, been levied upon different objects of taxation. The state revenues were derived from taxes upon land.

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excepting lots in town; the county and township revenues principally from taxes upon personal property, town lots and houses. Hence different systems were adopted for the levying and collecting taxes upon these different descriptions of property, and these systems were prescribed in separate and distinct laws. These laws were changed from time to time, but still the distinction was kept up between such as were enacted for levying taxes upon land, and such as regulated county levies. In each township a lister was appointed, whose duty it was, relative to county levies, to take a list of such personal property, town lots and houses, as were subject to county or township taxation, and it was further his duty, in conjunction with another township officer, denominated an appraiser, to appraise houses and town lots thus entered upon the list. These lists were returned to the commissioners of the respective counties, and from them the duplicate for county taxes was made out; and the taxes collected either by township or county collector, as the case might be.

Having made these remarks, I will now proceed to examine the objections made to the plaintiff's title in the case before the court. \*And the first is that it does not appear from the records of the [86 county auditor, that the several delinquent lists for the years 1823, 1824, and 1825, were sworn to.

It is clear that there is no such evidence, and if it is necessary to the validity of the plaintiff's title, the objection is well taken. In the thirtieth section of the act of February 8th, 1820, "levying a tax on land," 2 Ch. St. 1106, it is made the duty of the collector to attest, under oath, the list of lands returned by him to the county auditor, as delinquent for the non-payment of taxes. But this has nothing to do with the case before the court. That refers to delinquencies under a law levying taxes for state purposes. The lot in controversy was sold under a law "regulating county levies." And the law under which the taxes were levied for the non-payment of which it was sold, was the act of 27th February, 1816, Ch. S. 987. It is to this act, then, and to those subsequently passed, amendatory thereto, and upon the same subject, we must look to ascertain the rights of the parties.

Counsel for the defendant infer the necessity of an oath from the third section of an act of the 27th January, 1823, amendatory to the act entitled "an act regulating the duties of county auditors and county commissioners," 2 Ch. St. 1256. This section provides, "that the respective county auditors, on the final settlement with collectors, may, upon evidence to them satisfactory, make reasonable and just al-



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lowance to them for delinquencies in collecting, which may be owing to any persons who are chargeable in their duplicate, absconding, or being insolvent, and the said auditor shall examine the collectors under oath or affirmation, touching the delinquencies." Counsel both for defendant and for plaintiff, seem to suppose that the delinquencies here referred to, are the delinquencies of lots not sold for taxes. But I apprehend they are mistaken, and that these delinquencies are entirely of a different character.

This section is a transcript of the twentieth section of the act of February, 1816, before referred to, Ch. S. 987, "regulating county levies;" except that the county auditor is substituted for the county commissioners, and the oath of the party, for other testimony. But in the act of 1816, there is no provision made for returning lots delinquent, where the tax upon them is not paid. On the contrary, it is provided, in the twelfth section, "that whenever the tax on any lot or lots is not paid, on or before the first day of November, annually, and no goods and chattels can be found whereon to levy, the collector may levy on such lot or lots, thus charged," and after having given 87] \*thirty days' notice of the time and place of sale, in the manner precribed in the section, shall, if the tax remain unpaid on the day appointed for the sale, "proceed to sell so much of the lot or lots thus charged, as will discharge the taxes and costs." Ch. St. 989. There could then be no delinquency so far as town lots were concerned, unless from the want of purchasers.

The delinquencies contemplated in the twentieth section of the act of 1816, and in the third section of the act of 1823, which is in fact but a continuation of the former, are specifically pointed out in those two sections. They are such as happen in consequence of the "absconding or becoming insolvent" of any person who may have been charged with a tax upon the duplicate. The collector, when he received the duplicate, became chargeable with all the taxes contained therein, and was compelled to give bond in double the amount of tax charged in the duplicate, with security, "conditioned for the faithful collecting and paying into the county treasury, the *full amount* of the taxes by him to be collected," etc. Ch. St. 988. If taxes were not paid by a specified time, it was the duty of the collector to levy upon and sell the personal property of the delinquent or delinquents, to satisfy the amount of tax. Such being the duty and such the liability of the collector, it was just and proper, that if an individual whose name was upon the duplicate, should abscond, or should become insol-

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vent, so as to place it beyond the power of the collector to make collection, he should be relieved. To give this relief was the design of the two sections referred to. And by them the county commissioners, in the one, and the county auditor, in the other, were authorized, in such cases and under such circumstances, to make to collectors "reasonable and just allowances," in settlement. In other words, they were authorized to allow to collectors a credit for such taxes as were upon their duplicates, that could not by any diligence be collected.

But there could be no such delinquency in the case of town lots. Upon these the tax levied attached as a lien, and for its payment, the lots themselves, as before stated, were to be sold. And there could be no cause why a collector should have credit upon his duplicate for the amount of such tax, unless, as before remarked, the lot itself could not be sold for the amount of the tax.

The law of 1816 remained unchanged until January 29th, 1818, when an "act to prevent the sale of town lots for taxes," was enacted, 2 Ch. S. 1037. By the first section of this latter act, it is provided, "that where the owner or owners of unimproved or unoccupied town lots, do not reside within the limits of such town, and the tax assessed upon such lot shall not be paid within the time required by law, [88 the collector shall make return of all such delinquent lots, to the authority from whence they received their duplicate, whereupon a penalty of one hundred per centum, upon the amount of each year's tax shall be incurred, and each lot shall be bound for the tax and penalty due thereon, and the owner or subsequent purchaser shall be liable therefor." This is the first law to be found upon our statute books, requiring town lots, upon which taxes were not paid, to be returned delinquent. Previous to this time, such lots, under such circumstances, have been sold, but here was a partial change of the system. It did not extend to town lots generally, but to those only which were unimproved or unoccupied, and the owners of which did not reside within the limits of the town where such lots were situated. If upon lots of this description, the tax was not paid, it was the duty of the collector to return them delinquent. But there is nothing in the act which requires that this return shall be verified by oath.

The law was amended by an act passed January 29th, 1821, 2 Ch. St. 1178, but this latter act makes no change in the former law, except to reduce the penalty from one hundred, to twenty-five per cent. Like the law to which it is amendatory, it requires that the collector shall return a delinquent list, but it does not require that the same shall be verified by oath.

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During the existence of this latter law, the lot now in controversy was listed, appraised, taxed and returned delinquent for the non-payment of the tax of 1823.

The next law relative to the subject, is found in the ninth section of the act of February 23, 1824, entitled an "act defining the duties of collectors of county tax." 2 Ch. St. 1384. This is but a repetition of the first sections of the acts of 1818 and 1821, above referred to, with the following addition: "and the trustees of all townships and officers of incorporated towns, shall in like manner, cause all lots returned to them delinquent for township or corporation tax, to be certified to the auditor of the county, stating the number and appraised value, together with the tax and penalty due on such lot."

The county taxes for the years 1824 and 1825, and the township tax for 1825, were assessed upon the lot in controversy after the enactment of this law of February, 1823, and the taxes not being paid, it was returned as delinquent. And in pursuance of the latter clause of the section quoted, the delinquency for the non-payment of the township tax, was certified to the auditor of the county by the trustees of the township of Perrysburg.

From a careful examination of all these different statutes, and we 89] \*believe they are the only ones which have any bearing upon the question, we have been brought to the conclusion, that the law did not require the list of town lots, returned by the collector of township or county taxes, as being delinquent for the non-payment of such taxes, to be verified by oath. Such oath was not expressly required, nor can its necessity be inferred from implication. Should the enquiry be made why there is any difference in this respect between the return of a collector of state, and the collector of county taxes, we can only reply that the difference exists in the laws, by which their duties are prescribed. The reasons for the difference can not, probably, be very readily perceived.

The second objection to the title of the plaintiff is, that the said lot was charged with, and sold for a greater amount of taxes and penalties than what was due thereon.

In this particular, the counsel for defendant labor under a mistake. This lot was sold in pursuance of the law of January 18th, 1826, "providing for the collection of taxes on lands and town lots which have accrued prior to the year one thousand eight hundred and twenty-six," 2 Ch. St. 1519, in connection with the law of 1824, before referred to, "defining the duties of county collectors." In the sixth

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section of this act, it is provided, "that where the county collector, or trustees of any township, or officers of any incorporated town, or of any recorded town plat, shall have returned to the county auditor, a delinquent list of unimproved or unoccupied town lots or parts of lots, the owner or owners whereof do not reside within limits of such town; on which the tax assessed has not been paid within the time required by law; such auditor is hereby required, on or before the first day of August next, to make out a duplicate of such taxes, thereon charging the amount due, whether for township, county, or corporation purposes, adding to the tax of each year a penalty of twenty-five per cent., together with the interest on such tax," &c. In making out a duplicate in pursuance of this section, the county auditor charged the lot in controversy with a township tax and penalty amounting to twelve and a half cents, and county taxes, interest and penalties, amounting to sixty eight cents and seven mills. The amount actually due and owing, was as follows:

County tax for 1823,	10 cents—	Penalty 2.5 cts.	=12.5
" " 1824,	20 "	" 5. "	=25
" " 1825,	25 "	" 6.25 "	=31.25
Township tax, 1825,	10 "	" 2.5 "	=12.5
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81.25			

\*Whereas the amount actually charged, and upon which the land [90 was sold, was eighty-one cents, two mills, being one half mill less than the amount actually due. To the amount of taxes and penalties, should have been added the interest, which was not done, so that the lot, instead of being charged with too much, as is supposed by counsel, was charged with too little.

But it is insisted that the township tax should not have been included, because it is claimed there is not sufficient evidence of the defalcation or delinquency. There is precisely that kind and degree of evidence which is required by the statute, and this must certainly be held to be sufficient.

The third objection to the validity of the plaintiff's title is, that the certificate or return of sale, made by the collector of taxes, to the recorder of the county, does not show to whom the lot was sold.

The lot was sold, or ought to have been sold, according to the provisions of the act of 1824, "defining the duties of collectors of county taxes," 1 Ch. S. 1384. The seventh section of this act is as follows: "Whenever any town lot or lots, or any part thereof, shall be sold at

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vendue, by any collector of tax, agreeably to the provisions of this act, it shall be the duty of the collector to lodge with the recorder of the county, in which such lot or lots may be situate, within ten days after the vendue and sale aforesaid, the notification of such sale posted up by him, the newspaper containing the advertisement of such sale, if any, with a certificate, accompanying the same under oath, setting forth the amount of tax charged on such lot, that such tax remained unpaid, and that such notification was posted up according to law, which notification and certificate shall be recorded by such recorder."

It will be seen that there is nothing in this section requiring the collector to state the name of the purchaser in this return made to the recorder. The object seems rather to have been to preserve evidence of the notification and sale; for the section, after having prescribed that the notification and certificate should be recorded by the recorder, provides, "A certified copy of such record shall be competent testimony touching those facts, in any suit in which the validity of the collector's deed may be brought in question, and the said newspaper shall be kept on file by said recorder, and said recorder shall be entitled to receive such fees of said collector for recording, as is given in other cases for similar services."

By the next succeeding section, the collector is required to give the purchaser a certificate of purchase, "and at *any time* thereafter, 91] \*make a deed to the purchaser," and on or before the first Monday in January, then next following, he is required to "transmit to the auditor of his county, a list of all lots or parts thereof sold, also the *purchaser's name*," etc. Whether this return was made in the present case we know not, as there is no evidence upon this point. It is not necessary, however, that it should be done immediately after the sale. If it be made on the first day of January next succeeding, it is sufficient. Before this time a certificate to the purchaser must have been issued, and it may be that a deed has been executed. In fact in the case before the court, the deed was executed on the 19th of December, the very day of sale, which, if the proceedings hitherto had been in conformity with law, vested a title in the grantee, and it would be rather extraordinary to hold that this title could be divested by the failure of the collector to do an act which he was subsequently bound to perform.

The last objection to the plaintiff's title is, that there is no sufficient evidence of the publication of the delinquent list.

Before selling any town lot for taxes, it is by the sixth section of

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the act of 1824, made the duty of the collector to give thirty days' notice of the time and place of sale, "therein describing the lot by number, the proprietor's name, if known, and the tax due thereon, either by the publication of such notice in a newspaper, printed in the town where the lot lies, or by posting up notices thereof in four public places in the said town, and one at the door of the court house of the county."

The evidence before the court that this provision of the law was complied with, is contained in a copy from the record of deeds in Wood County, which purports to be a copy of the report of the county collector of Wood County, of the sale of in and out lots in the town of Perrysburg for taxes. It is as follows: "Having received of the auditor of Wood County, in the State of Ohio, a duplicate containing the following lots in the town of Perrysburg, in said county, as having been returned delinquent for the non-payment of taxes, which accrued previous to the present year, 1826, with directions to sell the same, I have levied upon, and shall sell the said lots, at the court house of said county, on the 19th day of December next, at ten o'clock, A. M., or so much of each as may be sufficient to discharge the said taxes, interest and penalties, thereon due, with the costs that shall have accrued, unless the same shall be previously paid, to wit, in lots charged to persons unknown." Then follows a schedule of the lots by their number, with the tax charged against each, and in this schedule is included the lot in controversy.

\*This notification bears date at "Perrysburgh, Wood County, [92 Ohio, November 16, 1826," and is signed by "Ambrose Price, collector."

Next follows a certificate in the following words: "I hereby certify the amount of taxes, interest and penalties, placed opposite each of the town lots, in the within notification, to be the true amount charged in the duplicate therein mentioned, that the same remained unpaid, and that the said lots were all sold whole and entire, for the said amounts, and legal costs, at vendue, in the said town of Perrysburg, at the time and place in said notification mentioned; and that said notification was by me posted up as the law directs. Perrysburg, Wood county, Ohio, December 26, 1826. Ambrose Price, collector of taxes, for Wood county."

This certificate appears to have been sworn to before a justice of the peace, and with the notification, recorded by the recorder of Wood county, on the 27th day of December, 1826.

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Harshman, Rench, and others v. Lowe, and others.

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This copy of the record, is, by the seventh section of the before recited act of 1824, competent testimony "touching those facts," stated in the notification and certificate. And being competent evidence, it proves that the notification was posted up according to law, and of course there is legal and sufficient evidence of the publication of the delinquent list.

From a careful examination of the whole case, we entertain the opinion, from the facts before us, that the lessor of the plaintiff has a good and sufficient title to the premises in controversy.

New trial granted.

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**HARSHMAN, RENCH, AND OTHERS v. R. P. LOWE AND OTHERS.**

Under the act of 1835, an assignment by a debtor creating a preference among creditors, is void as to the preference, though the fraudulent intent is confined to the assignor.

**BILL IN CHANCERY.** From Montgomery. The object of the bill is to avoid an assignment by a debtor, giving preference to one set of creditors over others, and to compel the trustee to sell and distribute the trust property for the benefit of all the creditors of the assignor. The defendants have answered, a replication has been filed, and testimony taken: but inasmuch as a majority of the court do not concur in opinion upon the evidence that the deed is fraudulent as against the plaintiffs, it is unnecessary to state the facts particularly, as the point decided will be understood without.

**93]** \*ODLIN and SCHENCK, for plaintiff, cited 5 Ohio, 295; 2 Dal. 76; 8 Ohio. 390; 5 Mass. 144.

C. ANDERSON, for defendants, cited 5 East. 175, 186; 10 Mod. 497; 2 Pr. Wms. 427; 2 Bos. & Pul. 584; 33. O. L. 13; 8 Ohio, 391; 36 O. L. 56; 1 D. & E. 156.

By the Court, WOOD, Judge. This assignment is controlled by the act amendatory to the act of 1835, directing the mode of proceeding in Chancery, 33 O. L. 13. This act provides that all assignments of property made by debtors to trustees in consideration of insolvency, and with design to secure one class of creditors and defraud others, shall *enure* to the benefit of *all*. We hold, in this class of cases, that

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although the fraudulent intent is confined exclusively to the grantor, the conveyance is *void as to the preference created*. This interpretation, we think, conforms both to the letter and the spirit of the act.

A different construction has been put, at Westminster, upon the statutes 13th and 27th of Elizabeth, and in Ohio, upon the statutes to prevent fraud and perjuries. *Burget v. Burget*, 5 Ohio, 469. Under these statutes it has been holden, that to avoid a conveyance made to defraud creditors, both the grantor and the grantee must be *partakers of the fraud*, or tainted with the fraudulent intent. But here the *cestuis que trust* are not parties to the assignment, although made for their benefit. Their assent is not essential to its validity. The trustee, in this case, has a *naked legal interest*, with no substantial advantage to himself from its execution, and in such cases, it could not have been the intention of the law that he should also participate in the fraud, to avoid the assignment.

The case is remanded for further proof as to the fraudulent intent.

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LESSEE OF ORRIN HARMON v. LEONARD STOCKWELL.

A county auditor had no authority in 1822, to administer an oath to the county collector to verify his return of the delinquent list.

A tax title acquired in 1822, is invalid, without the return of the delinquent list by the collector is sworn to before competent authority.

**EJECTMENT** to recover Lot 4, T. 5, R. 11, in the Connecticut Reserve. From Portage. The case is submitted upon the following facts:— The plaintiff exhibits a deed from the trustees of the Connecticut \*Land Company, to Ebenezer and Fidelio King, and a regular [94 title under it to themselves. The defendant traces his title to a tax sale made on the 24th of January, 1824, for taxes accruing during the years 1821, 2, 3. The land was listed on the duplicate, during these years, as follows:—

“Unknown owners, R. 11, T. 5, & L. 4, 161 acres, 2 rate.”

The land appears to have been duly described, the taxes regularly assessed, the advertisement properly made, and the several returns from the state auditor regular. The objections taken by the plaintiff are to the return of the county collector. The return of the delin-



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quent list of 1822, is verified by the oath of the collector, administered by the county auditor.

T. D. WEBB, for plaintiff, cited 1 Ch. St. 649, 651; 1 Blk. C. 89; 2 Ch. St. 1106; Mitchell v. Eyester, 7 Ohio; 8 Ohio, 107; 1 Wil. 61; 1 Ld. Ray, 68; 1 Bibb, 532, 3; 4 Ohio, 45; 11 Mass. 165, 413; 13 Mass. 270. 1 Bay. 338.

R. HITCHCOCK, H. WILDER, and R. P. SPALDING, for defendant, cited, 2 Ch. St. 1186, 974, 1102, 1188, 1194, 1256, 1377; 4 Wheat. 77; 7 Cow. 88; 3 Ohio, 233; 5 Ohio, 458; 8 Ohio, 539; 3 Bibb, 326; 2 Marsh. 244; 6 Munro 207; 1 Ch. St. 651; 9 Cow. 110; 7 Ohio, 2 part, 190, 258, 262; 8 Ohio, 114; 3 Stark Ev. 144, n.; 9 Mass. 312; 1 Swift Dig. 564; 1 Kirby 345; 11 Mass. 413, 477, 480.

D. LYMAN, for plaintiff, in reply.

By the Court, LANE, C. J. The statute, 2 Ch. St. 1106, § 30, requires in terms, that the list of delinquent lands returned to the county auditor during the years 1821, 2, 3, "shall be attested by such collector on oath." As the penalties of perjury were intended to be imposed for a false return, it is clear, that the oath must be administered by competent authority. If the auditor at that time possessed no such power, the list wants an essential requisite which invalidates the tax sale. The power to administer oaths is incidental to no office except the judicial. It must be conferred by statute, either directly, or by implication, or ministerial officers do not possess it. By the statute of 1810, 2 Ch. St. 651, § 17, county commissioners are authorized to administer all oaths necessary to discharge the duties of their office. When this law was passed, it was a part of the duties of the 95] \*commissioners to settle with the collectors of taxes. An oath administered by the commissioners, in a settlement with the delinquent collector, would be lawful; and if the auditor possessed the same power, the objection is removed.

In 1819, 2 Ch. St. 1102, § 10, the office of auditor was created, the duty of making settlements for taxes was transferred to him, and the commissioners no longer entrusted with it. The act creating the office of auditor, is silent as to any power of administering oaths, except only, he was specifically invested with it in taking lists from the owners of lands, and in examining the collectors of the county tax concerning delinquencies. 2 Ch. St. 1257. The grant of authority in these specified cases sufficiently implies that he possessed it in no other. In 1821, 2 Ch. St. 1194, "*the duties now done and performed*

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(as the statute expresses it) by the board of commissioners, are transferred to the auditor, except in certain cases, as reserved therein." By this act the auditor was empowered to do all which the commissioners could then do, among which was the incidental authority to administer such oaths as were necessary to discharge the duties of the commissioners thus transferred. But the power of the commissioners to administer oaths was not general; it was only in cases necessary in executing their duties, and it was no part of their duty, at that time, to receive the delinquent returns from the collector, nor was this service transferred to the auditor at that time, or by that statute.

We therefore find no authority, by any of these statutes, enabling the auditor to administer oaths, except in the specified cases, until the act of 1824. 2 Ch. St. 1377, § 5. The return of the collector, therefore, in 1822, was not under the securities and sanctions which the law required; and this omission is fatal to a title held under such strict principles as a tax sale, and supercedes the necessity of looking further into the case.

Judgment for plaintiff.

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\*LESSEE OF HALL AND OTHERS v. ASHBY & CRAVEN.

A deed of release is a substantive mode of conveyance in Ohio, and effectually transfers title, notwithstanding an adverse possession at the time of its execution.

A will made in another state, takes effect from the death of the testator, and not from the date of its registry in Ohio.

The registration of a foreign will in Ohio, is merely to admit a copy as evidence.

There is no statute of champerty in Ohio, and the English statutes are foreign to our condition and inoperative.

EJECTMENT for lots, 1, 2, 15, 16, and 17, in the 32d S. 8th T. 14th R in the U. S. Military District. From Knox. On trial, the plaintiff traced his title as follows: 1. A patent from the United States to Ludwick Weltner. 2. Weltner's will dated in 1781, admitted to probate in Maryland in 1782, devising the land as "the residue and remainder" of his estate to his daughter, Mary Henop, in fee. 3.

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Mary Henop's will, dated Oct. 1820, admitted to probate in Virginia, in the same year, devising the lots to her grandson, F. L. Henop : and 4. A deed of release from F. L. Henop to Hall, and his deed of an undivided third to his co-plaintiffs. Both the wills were admitted to record in Knox county, the 14th of March, 1838, and also proof that Mary Henop was sole heir of L. Weltner. The defendants proved that when F. L. Henop conveyed to Hall, and Hall to his co-partners, the defendants were in possession, holding adverse to Henop : that Philip Henop was a son and heir at law of Mary Henop : a deed from the sheriff of Knox county to Jasper Cope, under a sale on execution upon a judgment in foreign attachment commenced by Cope against Mary, Philip, and John Henop, which was advertised but six weeks, and the sale made under a *venditioni exponas*, no *fi. fa.* or other order of sale having issued. But after sale, the court confirmed the proceedings. The defendants deduced a regular chain of title from Jasper Cope to the defendants. Upon these facts the court directed the jury to find for the plaintiff, which they did, and the defendants move for a new trial, assigning for cause, error of the court : 1. In admitting the release from F. L. Henop to Hall as a conveyance, he being out of possession, and 2. In holding the devise from Mary Henop superior to the title of Jarvis under the attachment without notice of the devise.

C. B. GODDARD and C. C. CONVERS, for the motion. 1. Does the deed from F. L. Henop convey any title? The deed we hold void at common law, as a release to one having no title before. Co. Lit. 214, a. A release is a conveyance of a right to a person in possession. 1 [97] \*Cruise D. 97, ch. 6, § 21, 23; Shep. T. 324, ch. 19; 4 Cruise D. 96, 106, 109, ch. 7, § 1, 9; 3 Dane Ab. 139; 7 Cow. 255.

2. The sale under a judgment against the heir in 1822 to a *bona fide* purchaser without notice of the will, conveys a better title than was passed by the Maryland will of 1820, not recorded in Ohio till 1838. Sug. Ven. 685, 6; Poole v. Fleeger, 11 Pet. 185, 211; Wilson's Ex. v. Tappan, 6 Ohio, 174; Holdfast v. Clapham, 1 T. R. 600; 4 Kent. C. 338; Heath v. Ross, 12 Johns. 140; 29 O. L. 240.

H. STANBERRY, contra. 1. The words of conveyance used in the deed to Hall, release and quit claim, are in common use in conveying in this state, and sufficient to pass title, as operative words of conveyance, to a stranger having no precedent title. Our conveyances are distinguished into deeds of warranty and deeds of quit claim, and we use the latter term as synonymous with a deed without warranty.

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Taking the whole deed together, it is clear the grantor intended to convey to Hall all the estate he derived from the will. 2 Hilliard Dig. 364; 7 Conn. 255. The common law rule as to maintenance is not accommodated to our circumstances; its reason does not prevail here. 2. Both foreign and domestic wills take effect from the death of the testator, or from their admission to probate, which is a judicial act, while the mere record in Ohio of a foreign will is a mere ministerial act, affecting the proof, but in no way affecting the time at which the devise takes effect, the proof being made. 8 Ohio, 247. The probate does not make the will—the estate is not *in nubibus* or in *gremio legis*, between the death and the probate; nor in abeyance; nor yet in the heir; for it has been devised away from him, in the devisee, though inoperative as to purposes of evidence, until the will is proven and recorded. *Poole v. Fleeger*, 11 Pet. 185.

By the Court, GRIMKE, Judge. The questions arising in this case are: 1. Is the deed from F. L. Henop to Hall, a valid conveyance of the land? and 2. Is the title derived through the will of Mary Henop, superior to that of the purchaser at sheriff's sale, the will not having been recorded in Ohio until 1838?

With regard to the first point, it has been argued, that inasmuch as the deed from F. L. Henop is a deed of release, which presupposes the possession of the releasee, it was intrinsically ineffectual to transfer the title; and this is true, if that mode of conveyance is governed by the same rules which are applied to it in England. There, in [98 order to give effect to the deed of release, it is first necessary to execute a lease, (or bargain and sale for a year,) which by force of the statute of uses puts the lessee or bargainee in possession, and being thus in possession, although by a mere fiction, the release operating by way of enlargement of the estate, is effectual to transfer the entire title. So artificial a machinery for the purpose of effecting an object so very simple, we have always considered unnecessary in this state. The release is regarded here as a substantive mode of conveyance, and equally with the deed of quit claim, is adopted where it is intended to convey the land without warranting the title. But even if the deed in this instance, could not operate as a release, it might have such construction put upon it, that it should operate in some other way. Thus a deed intended as a bargain and sale has been construed to be a covenant to stand seized to uses, and a covenant to stand seized has been construed to be a bargain and sale.

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But it is argued, in the second place, that a conveyance to the plaintiffs, while the defendant was in the adverse possession of the land, was a void act, and that no title could be derived under the deed. But we have no statute against champerty in Ohio. All the English statutes have grown out of peculiar exigences, which are almost entirely foreign to our condition and habits. Sometimes they were passed at the close of a signal revolution, when the property of the kingdom having, to a great extent, changed hands, it became the interest of those who succeeded to power, to place every possible obstacle in the way of the former proprietors' recovering possession. After the introduction of uses, buying what were called pretended rights and titles became very common, and this gave rise to one of the last statutes on the subject, that of the 32d H. 8, which prohibited the practice under the penalty of forfeiting the whole value of the land. Both of these classes of laws were adapted to a state of society very different from what prevails here. So far from opposing obstacles to the transmission of land, we have endeavored to render it as free as possible. The simple prohibition of selling land, where the vendor has not a title to it, 29 O. L. 142, has set bounds to the only real inconvenience and mischief which has sprung from the practice of champerty.

The remaining question is more difficult than the two preceding ones; but it will admit of but one answer. We have no law, which, properly speaking, requires the registry of wills. The probate and the order admitting the will to record, are judicial acts, and are neither 99] \*of them intended to give notice to persons who may claim title adverse to the will. In England, the registration of wills is required whenever they happen to affect personal estate, but never if they relate to real property only. The reason of this is, that it is, impossible to fix an express period for registering them, in consequence of the absence, legal incapacity, or future interest of the devisee. The most that has been attempted to be done, is to declare that a registry should be made *before any action should be brought by the devisee*. No one supposes that in the case of a will made in Ohio, the title of the devisee takes its inception in any case from the period that the will is recorded: but it is argued that such must be the case of a foreign will. The difficulty, however, which exists in creating a registry of domestic wills, is even increased in the case of foreign ones, and no good reason can be assigned why, at any rate, the same rule in this respect should not be applied to both. The law requires the probate and record of a domestic will, 8 Ohio, 18, but the record of the foreign will is not in-

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tended to give publicity to the proof of it, nor to give notice of the title acquired under it. It is to permit a certified copy to be given in evidence, when it would be difficult or impossible to produce the original. In England, a will on a trial concerning real property devised by it is required to be proved precisely like a deed. The probate there has no relation to the realty, but only to the personal estate. In Ohio, it has relation to both, and the record which is consequent upon the probate, and which is very different from a registry in England, or of deeds, enables a copy to be given in evidence whenever a controversy arises concerning the property devised. It is evident that it is impossible to carry the provisions of the law any farther. A deed is committed to the custody of the grantee, who may record it whenever he chooses; but a will is placed in the hands of the executor, who may have no interest, or at any rate a very remote one, in the real property devised. This alone renders it absolutely impracticable to establish a registry of wills similar to one of deeds.

On the whole, we are of opinion that the deed to the plaintiffs, notwithstanding its form, and although the defendants were at the time in possession of the land, was effectual to transfer the title, and that this admission of the will to record was not necessary to perfect the title of the devisee; that his title commenced at the death of the deviser, and avoids the title under which the defendants claim.

Judgment for plaintiffs.

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\*YOUNG AND VAN HORNE v. WHITTON AND FULLERTON.

A certificate given by a commissioner of insolvents under the seventh section of the insolvent law, to a debtor who has given bond for the prison limits, discharges the security on the bond, notwithstanding the proceedings are afterwards dismissed in the Common Pleas.

There is no other difference between the effect of a commissioner's certificate and the final discharge, except that the first discharges for a limited time, and the latter *forever*, from all debts named in the schedule. The discharge in either case is a *legal* one.

**DEBT.** From Hamilton. The declaration recites a *captias* from the Common Pleas, on the 2d of October, 1832, against one Johnston, the defendant, his arrest, committal to prison, and discharge upon giving

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a bond for the jail limits, a judgment for three thousand seven hundred and forty-four dollars and fifty cents, in the suit at April term, 1833, and assigns for breach, that Johnston left the prison bounds the day he was committed. Plea, that on the 14th of May, 1833, Johnston applied to the commissioner of insolvents, took the oath, etc. gave bond to appear at the next term of the Common Pleas, and was discharged by the commissioner's certificate, under the seventh section of the insolvent law, wherefore he left the bounds. Replication, that after the proceedings before the commissioner, at August term of the Common Pleas, in 1833, Johnston's petition under the insolvent law was heard and dismissed, and thereafter Johnston left the prison bounds the next day, and remained out. To this there is a general demurrer, which is joined.

N. WRIGHT, J. C. WRIGHT, and T. WALKER, for plaintiff.

B. STORER, and C. FOX, for defendant.

By the Court, HITCHCOCK, Judge. Two questions are raised by the pleadings in this case. 1st. Whether a certificate by a commissioner of insolvents under the seventh section of the act for the relief of insolvent debtors, operates to discharge a person, who has been previously imprisoned and admitted to the jail limits, from such imprisonment?

2nd. Whether, where a person thus imprisoned, remains within the limits until his application for the benefit of the act shall have been heard by the court of Common Pleas, and dismissed, and afterward escapes, his sureties can be made liable upon the prison bounds law?

The condition of this bond as prescribed by law is, that the prisoner shall continue "in the custody of the jailor, within the limits of 101] said \*prison bounds, until *legally discharged*." If the prisoner is discharged by the act of his creditors, or by the act of the law, the condition of the bond is saved, and his sureties can not be made liable.

The act for the relief of insolvent debtors, in the seventh and eighth sections, provides for two distinct classes of insolvents. The seventh section refers to persons who shall have resided in the state two years, and in the particular county in which the application is made for the benefit of the act, for six months *next* preceding such application. 29 O. L. 330. Such person, being desirous of having his body exempted from imprisonment, may at any time make his application to the commissioner of insolvents. The eighth section, refers to any person

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who "shall be *arrested* or be in *custody* of any sheriff or other officer, on mesne or final process, in any civil action," whether such person be a resident of the state or not. Such person, being so arrested, may apply to the commissioner of insolvents, for the benefit of the act, and it is made the duty of the officer having him in custody, to take him before the commissioner for this purpose.

In the sections which follow, to the twentieth, the mode of proceeding before the commissioners is pointed out, varying in some few particulars, in consequence of the application having been made under the seventh or eighth section. It is unnecessary, however, in the present case, to have any reference to these variations.

In the twentieth section it is provided, "that when any person shall apply to the commissioner, and shall have complied with the foregoing provisions of this act, the commissioner shall give to the applicant a certificate of his having so complied: and it shall be specified in the certificate, whether such application was made pursuant to the seventh or eighth section of this act." In the twenty-first section, the effect of this certificate is declared. It "shall protect the person of the applicant from *arrest* or *imprisonment*, for any debt or demand in any civil action, at the suit of any person named in his schedule, until the second day of that term of the court of Common Pleas to which the commissioner shall return copies as herein after provided."

It will be seen that although it is the duty of the commissioner to certify whether the proceedings were under the seventh or eighth sections of the act, still the effect of the certificate is the same in either case. That effect is to "protect the person of the applicant from *arrest* or *imprisonment*." Is a person upon the prison limits, imprisoned? The condition of his bond, according to the act regulating prison bounds, is, that he shall continue in the "custody of the jailor," [102 29 O. L. 340, and in law, the prison bounds are but an extension of the walls of the prison. As the effect of the commissioner's certificate is to protect him for a limited time at least, "from imprisonment," and inasmuch as at the time the certificate is issued, he is already imprisoned, it would seem that the law must be so construed, as that the effect of the certificate would be to discharge him from such imprisonment.

If there is any doubt as to the propriety of this construction, such doubt must be removed by a further examination of the act. From the twenty-first to the thirty-fourth section, further duties are imposed upon the commissioner and upon the insolvent, and the course of pro-



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ceeding in the court of Common Pleas is prescribed. By the thirty-fourth section, that court is authorized, upon final hearing, to grant to the applicant a certificate, which certificate, according to the thirty-sixth section, "shall protect the person of such petitioner *forever after, from arrest or imprisonment*, for any civil action, debt or demand, named in the schedule of his debts, made before the commissioner" in the manner previously provided in the act. And this section further provides, that "if any sheriff or other officer, shall arrest any person having been so discharged by the court, such officer having knowledge of such discharge, and that the person so arrested has a certificate, so granted him by the court, or shall refuse to discharge the person so arrested, out of his custody, as soon as such certificate shall be produced and shown to him," the officer so offending shall be deemed guilty of a trespass, and shall be liable to an action at the suit of the party injured. It would be defeating the obvious intention of the law, to hold, that this *final certificate*, would not operate to discharge a debtor already imprisoned from that imprisonment, nor do I understand the counsel for the plaintiff as contending that it would not have this effect. It will be seen, that there is no difference in the law as to the effect of this final certificate and the commissioner's certificate, except that the first operates "to protect from arrest and imprisonment," *forever* after it is granted, while the latter protects "from arrest and imprisonment," only for a limited period.

It is unnecessary, however, to rely alone upon construction. In the twenty-second section of the act, it is expressly provided, that when the insolvent shall produce the certificate of the commissioner "to any officer in whose custody he may be, or who shall have civil process against him, the officer shall forthwith discharge him out of his custody."

103] \*The next question raised by the pleadings is whether, where a person remains within the prison limits after he has received the commissioner's certificate, and until his application has been heard and dismissed by the court, and afterward escapes, his sureties can be made liable upon their bond. The condition of the bond is, that the principal "shall remain in the custody of the jailor, within the limits of said prison bounds, until legally discharged." The certificate operates as such legal discharge, and after it is granted, the jailor has no right longer to detain him in custody. And the debtor being legally discharged, the condition of the bond is saved. That the application is fraudulent, and on that ground dismissed, can make no difference with

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the sureties. That the debtor chose to remain within the limits of the prison while his application was pending, can not affect their rights. Having been once "*legally* discharged," they must be protected from all liability on the bond.

The replication is insufficient, and the demurrer must be sustained. Judgment for defendants.

## TOMLINSON AND SPERRY v. HENRY WARNER.

Case will lie for falsely and maliciously suing out a writ of attachment against the plaintiffs' effects to their injury, though it be admitted they were *indebted* to the defendant.

A creditor's *false* affidavit, that his resident debtor *absconds* is not *probable cause* for issuing an attachment against his effects.

**MALICIOUS PROSECUTION.** From Licking. The plaintiffs declared, that they were residents of the town of Newark, and possessed of a large amount of personal property, deposited in a ware house to be forwarded to New York for a market; and that the defendant, well knowing the premises, and that the plaintiffs had not absconded, but contriving and maliciously intending wrongfully to injure them, made oath before a justice of the peace, that they had absconded to the injury of their creditors, as he verily believed, and thereupon sued out of the court of Common Pleas, a writ of attachment, and caused the said property to be seized by the sheriff, and held for a long time, whereby the same was injured, the plaintiffs deprived of the opportunity of forwarding their goods to a market, and greatly injured. Plea, not guilty.

Upon trial to the jury, the counsel for the plaintiffs *admitted* that the plaintiffs were indebted to the defendant at the time of his *affidavit*, as sworn to in it; whereupon the court directed a non- [104 suit, with leave to move to open it, and for a new trial, which is now made.

GEO. B. SMYTHE, and H. H. HUNTER, for plaintiffs, insisted, that the admission of the indebtedness of the plaintiffs, which might have constituted probable cause for an ordinary suit, did not destroy *this* action, the gravamen of which is, that the defendant *maliciously* and *without probable cause*, procured to be issued by his own false affidavit,

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an unusual and oppressive *kind* of process, not adapted to the legal liabilities of the parties, to effect a malicious purpose. He cited *Swan v. Saddlemire*, 8 Wend. 680; 1 Ch. Pl. 133, 4; *Sutton v. Johnstone*, 1 T. R. 503; *Rogers v. Brewster*, 5 Johns. 126; Bul. N. P. 11, 12, 13; *Goslin v. Wilcock*, 2 Wils. 376; *Smith v. Cattel*, 5 Wils. 376; *Wicks v. Fentham*, 4 D. & E. 247; 1 Str. 690; 4 Serg. & R. 17; *Reynolds v. Kennedy*, 1 Wils. 233; *Pangburn v. Bull*, 1 Wend. 351; *Chapman v. Piskerville*, 2 Wils. 145.

T. EWING, H. STANBERRY, and J. R. STANBERRY, for the defendant, insisted, that to sustain this suit, the action by the defendant must have been not only *malicious*, but *without probable cause*, and that the existence of the debt was cause of action; the defendant only mistook his remedy. 10 Johns. 106; 1 Wend. 345; 1 Salk 14; 1 B. & Pul. 205; 1 Ch. Pl. 136; Wheat. Sel. 809.

By the Court, WOOD, Judge. The only question presented in this motion is, do the facts set forth in the declaration constitute a legal cause of action, provided the plaintiffs were indebted to the defendant, when he sued out the writ of attachment?

In Connecticut, there is a statute which provides, that where a plaintiff shall "willingly and wittingly," wrong any defendant by prosecuting any action against him with intent wrongfully to trouble and vex him, such plaintiff shall pay treble damages for the first offence, be liable to a fine for the second, and for the third, may be proceeded against as a common barrator. Judge Swift thinks the act founded in the clearest principles of justice. Swift Dig. 493. At common law, it seems well settled, that no action will lie for a *malicious* prosecution of a *civil* suit, *without* cause, where there is no arrest. 1 Salk. 14. The costs allowed in all other cases, are supposed to be a [105] sufficient compensation for the injury, however *malicious*. The rule itself may perhaps be admitted, but *the reason* on which it is said to be founded, can not be so readily admitted, for at common law, *no costs were allowed*. If the plaintiff failed, he was amerced for his *false clamor*, and if he succeeded, the defendant was at the mercy of the king. But at common law, whenever there was an arrest, holding to bail, or imprisonment, where *no debt was due*, or for a greater sum than was due, with a malicious intention to injure, the action lay for a malicious arrest. 1 Saund. 228. The action for a malicious prosecution, which, technically, only applies to cases of malicious prosecution of criminal complaints, lies as well where there is not, as where

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there is an arrest; and the grounds of the action are the *malice* of the defendant, want of *probable cause*, and injury to the plaintiff's person by imprisonment, his reputation by scandal, or to his property by expense. 1 Swift D. 491. Having no *direct* adjudication on the question before us, we may look to the analogies of the law. The counsel for the defendant insist that because the plaintiffs' indebtedness to the defendant in the former suit is admitted, there was *probable cause* for suing out the writ of attachment. This does not seem to us to follow. To constitute *probable cause* for suing out a writ of attachment, the law requires an affidavit of indebtedness, and also that the debtor has absconded, or is non-resident. The absence of either is absence of *probable cause* for the writ, and the false affirmation of either fact, knowingly, as a means of procuring the writ, shows express malice, whilst the taking of property without cause, is a sufficient injury to sustain the action.

In the Supreme Court of New York, it has been decided, that case would lie against both plaintiff and defendant, for fraudulently setting up the judgment as unsatisfied, when in fact paid, and causing an execution and sale of land once held by it as a lien, but which had been afterwards conveyed by the defendant to a third person. The court in that case say, "if it appear that the unlawful acts of the defendant occasioned trouble, inconvenience, or expense to the plaintiff, this action lies." The general rule is, that for every injury the law gives redress; and it would be a reproach to the administration of justice, if one, by perjury, could take from another the control of his property, under form of law, and the law afford no remedy. Nice technicalities are sometimes applied to get rid of a hard case; but when, under form of law, opportunity is sought to gratify malice, to the injury of another, courts will not be astute to avoid, but rather seek ground to sustain an action. We have no facts in this case, \*before us, but [106 the statement in the declaration, and the admission of indebtedness; but these show a sufficient *prima facie* cause of action, and cause for opening up the nonsuit.

New trial granted.

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#### WILLIAM CARPENTER v. ALLEN KELLY.

A surety receiving securities as an indemnity, is protected from loss if he manage them with prudence, good faith, and integrity.

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Carpenter v. Kelly.

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Such surety receives indemnity in trust for himself and co-security, and no change of the indemnity made in good faith, will discharge his co-security from contribution without he show consequent loss.

Notice of the payment of the debt by a surety, is necessary to constitute a right of action against a co-security, for contribution.

**ERROR** to the Common Pleas of Delaware. The suit below was by Kelly against Carpenter and his co-security for Thorpe, for a contribution. The plaintiff proved the giving of a note by W. and A. Thorpe, and the defendant and himself as sureties, for fifteen hundred dollars, which the plaintiff had paid, and that the Thorpes were compounding their debts by paying and securing fifty cents on the dollar. In defence it was shown, that soon after the debt was contracted, the Thorpes placed in the hands of Kelly, as security for his liability, certain notes against Leonard and others; that on Kelly's enquiring of the maker, as to their intention and means of payment, he was assured that payment would soon or ultimately be made; and payment of the security notes was, in fact, made soon after. But before the notes were paid, Kelly, at the request of the Thorpes, returned them, receiving as security in lieu of them a bond of indemnity against their responsibility for the debt. At the time of this change, Carpenter lived near, but it was not shown that he was consulted; nor was there any evidence of a demand upon Carpenter by Kelly after payment. The court below thereupon charged the jury, that if Kelly abandoned his right to a contribution against Carpenter, he could not recover, but that the change of security would not of itself discharge him, if Kelly acted in good faith and with common prudence, unless he intended to abandon his claim: that the omission to consult Carpenter would not affect Kelly's right to recover, if it arose from a belief in Carpenter's insolvency: and that no demand was necessary, before suit. The plaintiff had judgment, and these facts appearing in a bill 107] \*of exceptions, it is assigned for error that the court erred in charging jury in the above particulars.

**T. W. POWELL**, for plaintiff in error. The principle is, that a co-security, or principal, who has in his hands the means of satisfaction, and suffers it to pass out without the consent of the others interested, can not call for a contribution. *Theo. on Prin. & S.* 95, 98. He is held as trustee for all the parties interested. *The Com'th v. Miller's ad.* 8 Serg. & R. 457; *Barber v. Briggs*, 8 Pick. 129; *Haynes v. Ward*, 4 J. Ch. 129; 4 Vesey 829; 2 Cox 86; *Lichtenthaler v. Thompson*, 13 Serg. & R. 157. A previous demand was necessary. 1

## Carpenter v. Kelly.

Ch. Pl. 360, 2, 3; 2 Saund. 32; 1 Leigh's N. P. 120; 1 Taunt. 571; Cook v. Feval, 13 Wend. 287; 5 T. R. 409; 2 Stark Ev. 774; 2 Sand. Pl. & Ev. 193; 2 Pick. 125; 4 Dane Ab. 406; Williams v. Williams, 5 Ohio, 446; 20 Johns. 586; Wood v. Pugh, 7 Ohio, 162; 2 Barn. & Cres. 682.

G. SWAN & WATSON, contra, contended that Kelly held no trust. They commented upon the authorities cited by Powel, and sought to distinguish this case from those. Holding no trust for Carpenter's separate account, Kelly is not answerable to him, for any loss in the change of securities, made in good faith. He is only answerable for what has been actually received. 17 Mass. 464; 6 Mason 188; 6 Cranch 268; 1 Wash. C. C. 278, 455; 3 Caine, 174; 6 Cow. 185. As to the notice, the 5 Ohio, 455, conclusively shows the notice unnecessary, except in case of numerous small payments. Cage v Foster, 5 Yerg. 261.

By the Court, LANE, C. J. The first question in this case is, whether a surety, who has received securities from his principal, and who in good faith has exchanged them for others, without the consent of his co-surety, thereby discharges him from contribution? A surety is not bound by law to seek indemnity; yet if the means of indemnity are placed in his hands, and he undertakes to retain them, he becomes a trustee for his co-sureties, because they enure to their common benefit, and he is bound by the obligations which attach to a trustee to use honesty, good faith, and due discretion, in their management. He may not abandon them without cause, nor negligently omit the steps necessary to render them available. But if they require the exercise of judgment in their management, he is to be protected like a trustee, who acts with integrity and ordinary prudence.

\* Kelly, in the present case, is represented as taking notes, [108 which upon enquiry he was led to believe would be ultimately, but not punctually paid. The manner of collecting debts, under such circumstances, must be a subject of discretionary power, and involve expenses and risks which he might not willingly undertake. If under these circumstances, he chose to restore them to the principal, on receiving other security which was satisfactory to him, and which no evidence showed was inferior to the indemnity released, this exchange ought not to preclude him from his remedy. It would have been prudent in him to have obtained the assent of his co-surety, but he was not bound to seek him, and his acting without it is no release of his co-surety, unless shown to have been to his prejudice.

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*Lessee of Parker v. Miller.*

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There is nothing in the charge of the court, not in accordance with these principles. The defendant below assumed to make a defence; he undertook to show, either that Kelly had directly or indirectly discharged him, or that he had negligently or improvidently mismanaged the trust. These points are properly placed before the jury in the charge.

The bill of exceptions shows that the court also instructed the jury, that no demand was necessary to give the right of action. I suppose by this it was intended to say, that no notice was necessary. We think, in this, the court committed an error. Carpenter was not originally, and by his own act, a debtor of Kelly, but became so by Kelly's payment of the debt. No liability so constituted arises, until notice of this payment. It is therefore a material fact to establish a right of action. This point was adjudged in *Williams v. Williams*, 5 Ohio, 446.

Judgment reversed.

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**LESSEE OF GEORGE PARKER v. THEODORUS MILLER AND OTHERS.**

Under the attachment law of 1810, the title acquired by the purchaser at auditor's sale, is preferable to the title of an alienee of the judgment debtor, by deed executed more than one year before the service of the writ of attachment; but not recorded.

Where the record in the attachment does not show that notice of the pendency of the suit had been advertised, the fact of publication may be proven by parol.

**EJECTMENT** for a tract of land in T. 8, R. 3, in the Connecticut Reserve. From Ashtabula. The case was submitted in the county upon agreed facts, and evidence.

**109]** \*Both parties claim title under Solomon L. Fuller, who, on the 23d of February, 1811, was seized of the premises in controversy, in fee simple. On that day, Fuller, by deed of quit claim, conveyed to Apollos Griswold. This deed was not recorded until June, 1813, more than two years after its date. At the time of the execution of this deed, both Fuller and Griswold were non residents of the state of Ohio, and have so continued ever since. On the 23d of September, 1837, Griswold conveyed the same land by deed to George Parker, the lessor of the plaintiff. This deed was duly recorded. This constitutes the evidence of title in the plaintiff.

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 Lessee of Parker v. Miller.
 

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The defendants derive title under the attachment law of Ohio, of 1810. On the 19th of June, 1812, Zadoc West prayed out a writ of attachment, against Solomon L. Fuller, in virtue of which, the lands in controversy, were attached on the next succeeding day. This suit was prosecuted to judgment in due course of law. Auditors were appointed to examine and adjust claims which might be exhibited against the attachment debtor. These auditors reported to the court of Common Pleas from which the attachment was issued, their report was confirmed by the court, a judgment rendered thereon, and the land attached ordered to be sold. The land was sold accordingly, and purchased by Hosea Brown; and a deed made to him by the auditors on the 3d day September, 1813, which was recorded on the same day. On the 17th day of November, 1813, the auditors made their final report to the court, showing the sale of the land, and the distribution of the funds arising therefrom.

The defendants deduce title from Brown, by deeds duly executed; and they and those under whom they claim, have been in actual possession many years, and since 1813, the taxes have been paid by Brown and his alienees.

The record in attachment does not show that notice of the pendency of the suit was given according to the law then in force, although in the bill of costs, there is an item taxed as the fee for advertising. To supply this supposed deficiency, however, it is agreed that in point of fact notice was given, provided such notice can with propriety be proved, *aliunde* the record.

E. WADE, and RANNEY, for plaintiff, cite the following authorities, to wit, 7 Ohio, 259, 274; 2 Kent Com. 91; 19 Johns. 40 Ohio, Con. 696; Wright, 209, 566; 4 Johns, 216; 13 do. 471; 4 Cow. 605; 2 Bin. 46, 497; 1 Ohio, 257; 5 Ohio, 181; 7 Ohio, 69, pt. 1; 2 Ch. Cranch, 355; 3 Cranch, 73; 5 Day \*80; 3 Bin. 400; 1 Dal. 3, [110 430; 4 Dal. 279; 3 Mass. 558.

T. D. WEBB, R. HITCHCOCK, and WILDER, for the defendants, cited the following cases: 1 Ohio, 326; 3 Ohio, 306, 562; 4 Ohio, 130, 131; 5 Ohio, 520, 524; 7 Ohio, 107; 3 Ohio, 257, 325, 561; 7 Ohio, 200, 259; 3 Mass. 399; 10 Mass. 105; 5 Pet. Cond. 244; 10 Pet. 449; 2 Pr. Wms. 491; 1 Swift Dig. 94; Jer. Eq. 377; 3 Brown Ch. Ca. 571; Kirby, 103; 1 Root, 388; 2 do. 287; 5 Day, 207; 8 Conn. 549; 8 Mass. 113, 230, 433, 439; 11 Mass. 156, 204; 6 Bin. 119; 2 Verm't, 544; 12 Wheat. 179; 15 Wend. 588; 4 Bibb. 78; 7 Ohio pt. 1, 69;



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2 Bin, 40 ; 3 Yeates, 186 ; 1 Ohio, 295 ; 2 Bibb, 416, 421 ; 7 Monro, 261 ; 3 Marsh, 12 ; 1 Marsh, 310 ; 4 Littel, 272 ; 6 Monro, 192.

By the Court, HITCHCOCK, Judge. There being no question in this case, but that Fuller had title to the premises in controversy, and that his title was conveyed to Griswold, it is clear that the plaintiff must recover, unless this title is defective by the proceedings in attachment.

On the part of the defendants, it is claimed that the proceedings are valid, although irregular, and that they can not now be impeached for irregularity, for two reasons : 1st. Because it is too late to reverse them in error. 2nd. They can not be impeached collaterally.

It is further claimed that an attachment is a specific lien which holds from the time the land is attached, and is to be preferred to any deed, although dated and acknowledged before the service of the attachment, provided the deed is not recorded within the time prescribed by law.

On the part of the plaintiff, it is claimed that the proceedings in attachment are utterly void, because first, no property of the attachment debtor was seized in attachment, and without such seizure of property, the court issuing the writ, could not acquire jurisdiction of the subject matter. 2nd. The court issuing the writ, had no jurisdiction to render judgment, until the notice required by law of the pendency of the suit, had been given, and the evidence that such notice had been given should appear of record. If it do not appear of record, the deficiency can not be supplied by parol proof, or proof *aliunde* the record.

It is further contended, that, even admitting the proceedings in attachment to be of binding force and validity, still the title of the [111] \*plaintiff remains good, inasmuch as the deed from Fuller to Griswold, although not recorded within the time limited by law, was in fact recorded before the judgment in the court of Common Pleas, and the sale to Brown.

The position assumed by the defendant's counsel, that the proceedings in attachment can not now be reversed for error, nor impeached collaterally, is correct, if the fact be established that the court of Common Pleas in which those proceedings were had, had jurisdiction of the subject matter. This position does not seem to be controverted by the counsel for plaintiff. On the contrary, the first objection by them made is that the court had no jurisdiction. And this objection leads

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to the enquiry as to what was necessary to give the court jurisdiction. This subject is regulated by statute, and at the present time, in ordinary proceedings, according to the course of the common law, a court acquires jurisdiction of a particular case, if the matter in controversy be within its jurisdiction, by the service of process upon the person of the defendant, or that which is equivalent thereto. Although at the time these proceedings were had, if the person of a defendant could not be found, a plaintiff might have an attachment against his lands, tenements, etc. and upon the return of the sheriff that the lands, tenements, etc. had been attached, he might proceed and recover judgment in the same manner as if personal service of process had been made. 1 Ch. St. 712.

But the proceedings in the case now under examination, were not according to the course of the common law. They were under the act of February 14. 1810, "allowing and regulating writs of attachment." 1 Ch. St. 672. This act contemplated proceedings against both *absconding* and *absent* debtors. In either case they were substantially the same, with the exception of the form of the affidavit, which was in all cases required to be filed previous to the issuing of the attachment. Upon the filing of the affidavit, it was made the duty of the clerk to issue a writ of attachment, directed to the sheriff or coroner, as the case might require, "commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of the debtor, wherever they might be found." It was then made the duty of the officer to whom the writ was directed, to seize upon the property of the debtor, and dispose of the same as in the statute provided, and make return of his doings to the court from which the writ issued.

Now it is clear that if there was no property which could be attached, and the officer should so return, the court would have no jurisdiction to proceed further in the case. In the case of *Mitchell v. Eyster*, 7 O. R. 257, it is said by the court with respect to proceedings in attachment, "the facts necessary to attach jurisdiction at the commencement of the suit were, the indebtedness of the defendant, his non-residence, and the actual levy of the attachment upon property owned by him, or in his hands, subject to the payment of the debt sued for." It will not be sufficient that the attachment is levied upon property belonging to third persons, it must be the property of the defendant. *Evans v. Justice*, 7 O. 273.

In the case of *West v. Fuller*, now under consideration, there is no controversy but that Fuller was indebted, and that the proper affidavit

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was filed. But the objection is made that the property attached was not the property of Fuller, but of Griswold, it having been conveyed to the latter on the 23d of February, 1811, whereas the attachment was not levied until the 20th of June, 1812. This objection raises the question whether the lands in controversy, under the circumstances of the case, were liable to be attached as the property of Fuller. This is a question of very considerable difficulty, and one with respect to which we have had serious doubts, but have come to the conclusion that they were thus liable.

There can be no doubt but that as between Fuller and Griswold, the title was vested in Griswold; but how was it with respect to third persons? The deed conveying the land to Griswold, was executed on the 23d of February, 1811, but it was not recorded until the 1st day of June, 1813. It was executed without the state of Ohio. The act of the 12th January, 1805, "providing for the execution and acknowledgement of deeds," 1 Ch. St. 484, provides in the 4th section, that deeds executed without the state of Ohio, for the conveyance of lands within the state, shall be recorded in the county where the land lies, within one year after the day of execution, and if executed within the state, within six months after the day of execution, and if not so recorded, "the same shall be deemed fraudulent against any subsequent *bona fide* purchaser or purchasers, without knowledge of the existence of such former deed or conveyance." This law of 1805, differs from the present law, relative to unrecorded or unregistered deeds in this particular: the present law contains a proviso, "that such deeds may be recorded," after the expiration of the time prescribed, and "from the date of such record shall be notice to any subsequent purchaser;" the law of 1805, contained no such provision. 29 O. L. 248.

Under this law of 1805, if a deed was not recorded within time, 113] \*and the grantor should convey the same land to another person, the first conveyance, as to the second grantee, would be void, and the legal title would vest in him. If Fuller, after the expiration of the year from the date of the deed to Griswold, or even within that time, had conveyed the land in controversy to Brown, the title would have been complete in him, unless it could be proven that he had actual knowledge of the existence from the former deed. From this it will be seen, that although as between Fuller and Griswold, the title was in Griswold, yet as to any other person, not having knowledge of the former deed, Fuller could make a good and valid title. The 13th section of the attachment law of 1810, prescribes, "that every bargain,

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sale, assignment, and conveyance, made by the said auditors, or any two of them, by virtue of the authority herein granted, shall be as binding and effectual, as if the same had been made by said defendant, prior to the service of said attachment." The attachment was served on the 20th of June, 1812. At and prior to that time, as we have already seen, Griswold could have made a conveyance "binding and effectual," to vest title, and according to the section above quoted, the conveyance of the auditors, under the attachment law, must be held to be as "binding and effectual," as a conveyance made by him.

From these considerations, we have been led to the conclusion before stated, that the land in controversy was, under the circumstances, liable to be attached as the property of Fuller.

It is further contended by the counsel for the plaintiff, that the court of Common Pleas had not jurisdiction to render judgment in the case, until the notice required by law of the pendency of the suit had been given, and therefore that the judgment is void. This objection raises the question, whether under the law of 1810, a court acquired jurisdiction by the service and return of the writ of attachment, or in consequence of the advertisement of notice, which was an act subsequently to be done. For some purposes it must be manifest that the jurisdiction was acquired before the publication of the advertisement. This advertisement was, upon the return of the attachment, to be made out by the clerk of the court, and it was the duty of the plaintiff, within thirty days after the return of the writ, to cause the advertisement so made out, to be published in one of the newspapers printed in the state, and nearest to the place where the attachment issued. If the plaintiff failed in having the notice published, it was made the duty of the court to dismiss the attachment at his costs.

At the return term of the writ, and of course before the notice could have been published, it was the duty of the court to appoint auditors to adjust the claims of the attaching creditor, and of such other creditors as might be presented. And upon the report of these auditors, the court was required to render judgment. For the purpose of appointing auditors, and for other purposes specified in the act, the court must of necessity have exercised jurisdiction, before the notice could have been given. Under these circumstances, it is a serious question whether the failure to give notice, and have the proof of it inserted in the record, is mere matter of error, or matter which goes to the jurisdiction. If mere matter of error, it can only be reached by writ of error, and can not be set up collaterally to impeach

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the judgment. In the case of *Mitchell v. Eyster*, 7 Ohio, 257, it was held that the facts of the indebtedness of the defendant, his non-residence, and the actual levy of the attachment upon his property, gave jurisdiction. And in the case of *Voorhees v. Jackson*, 10 Pet. 449, it was decided that the want of evidence of publication upon the record, was at most but error, and did not vitiate the proceedings.

But in the present case, we are relieved from the necessity of deciding this question. It is admitted that the notice was actually given, and may be so considered, if it be consistent with the principles of law to prove the fact *aliunde* the record.

It is worthy of remark, that in the law under which these proceedings were had, there is nothing requiring the clerk to record a copy of the advertisement, or to state in the record the fact that the same had been published. Nor is there any thing stated as to the manner in which the proof of publication should be made. The provision is, that publication shall be made, and unless made, that the suit shall be dismissed at the costs of the plaintiff. A suit not being dismissed, but proceeding to judgment, affords at least a reasonable presumption, that proof of publication must have been made in some way to the court. The practice at this early period, according to my recollection, in all cases where publication in a newspaper was required, was, to introduce the papers themselves, and all the papers containing the publication, to show that the law had been complied with. And it was not until within a comparatively recent period, that the practice was introduced, of filing a copy of the advertisement, verified by affidavit, that the same had been published the length of time required by law. In either case, however, it would seem to be proper that a suggestion of the fact should appear upon the record. At least, such would be our ideas of propriety, at the present day.

Another thing, too, ought to be recollected. At the time these 115] \*proceedings were had, the duties of clerks were pointed out, and the papers specifically stated which were to be copied into the complete record. Hence it would not be strange that he should omit to record those things, which by law, he was not required to record. The law in force at the time the judgment in the attachment was rendered, did not require that, in ordinary cases, the writ should be recorded. And we know that according to the English system of practice, as well as according to the practice of some of our sister states, the original writ is never considered as a part of the record. The law

upon this subject has not been uniform in this state, but like many other of our laws, has been subject to frequent changes.

The first law, it is believed, which required clerks, in specific terms, to make records, was the act of February 17, 1808, amendatory to "the several acts organizing the judicial courts," 1 Ch. St. 567; although their duty so to do, might be inferred previously, from the law regulating fees, which allowed them a compensation for making records. The 16th section of the act of 1808, provides "that when any cause shall be finally determined, the clerk of the court shall enter all the pleadings and papers filed as evidence therein, and the judgment thereupon, so as to make a complete record thereof."

This act continued in force until 1810, when it was repealed by the act of February 16, of that year, "to reduce into one the several acts organizing the judicial courts, defining their powers and regulating their practice." 1 Ch. St. 705. By the 103d section of this latter act it is enacted, "that whenever any civil cause, of whatever nature it be, shall be finally determined, the clerk of the court shall, during the next vacation, enter the warrants of attorney, original writ or writs, declarations, pleadings, proceedings, and judgments in such cause, so as to make a complete record thereof," etc.

This act was amended by an act passed February 4, 1813. 1 Ch. St. 794, by which this 103d section was explicitly repealed, and the following provision introduced, to wit, "whenever any suit shall be finally determined, the clerk of the court shall, during the next vacation, enter the indictments, presentments, declarations, pleadings, recognizances, proceedings, and judgment in such cause, so as to make a complete record thereof," etc. This was the law in force at the time the judgment was rendered in the case under consideration. And it is believed, that from this time until the passage of the act of February 18, 1825, "To organize the judicial courts and regulate their practice," 2 Ch. St. 1263, there was no law in this state requiring, in terms, a clerk to enter the writ in the complete record

\*If under the law of 1813, it should become necessary in order [116 to sustain a judgment, to prove the issuing and service of the writ, can there be a doubt but that the fact might be proven by the production of the writ and return thereon; or if the writ could not be produced, then by secondary evidence? We think not. A party claiming under such judgment, would not be confined to the complete record. All things required to be inserted in that record must be proved by it, but things not required to be inserted, might, from necessity, be proved

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*aliunde*. Upon the same principle in the case before us, the clerk not having been explicitly required to insert the fact of the publication of notice in the record, that fact may be proven by evidence *aliunde*.

It is further contended by the plaintiff's counsel, that admitting the proceeding in attachment to be of binding force and validity, still the title of the plaintiff remains good, inasmuch as the deed from Fuller to Griswold was recorded before the judgment and sale by the auditors.

Upon this point, many authorities have been cited by counsel for both parties. The cases are, however, very few of them like the present, although somewhat analogous. Still the decisions in those cases have not been uniform, and after all we must be governed by a fair construction of our own state legislation. It has already been decided in the present case, that the property might be attached as the property of Fuller, the time having expired within which the deed from him to Griswold should have been recorded. The effect of levying the attachment is declared in the law. "Such writ when served, shall bind the property and estate of the defendant, so as aforesaid attached, from the time of executing the same." 1 Ch. St. 674. The attachment then operates as a specific lien upon the property from the time it is attached, and a subsequent conveyance by the attachment debtor of the same property, could not defeat this lien. Neither could the recording of a deed, subsequent to the levy, have this effect, provided that deed was recorded out of time. Although the property is bound by the levy of the attachment, from the time of the levy, the title remains in the debtor, subject to this incumbrance, until sold and conveyed by the auditors. When so sold and conveyed, the law again declares the effect of the conveyance. It "shall be as binding and effectual as if the same had been made by the said defendant, prior to the service of the said attachment." If this conveyance had been made by Griswold to Brown, on the 19th of June, 1812, the day before 117] the attachment was levied, there can \*be no doubt that it would have vested a title in Brown, which could not have been defeated except by proof that at the time, Brown had knowledge of the execution and existence of the former deed. The same effect results from the execution of the conveyance by the auditors. Such is the literal provision of the statute, and we do not feel ourselves authorized to defeat this provision by construction.

Judgment for defendants.

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Lessee of Pillsbury et al v. Dugan's Admin'r, and the same v. Cade.

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LESSEE OF ABIGAIL PILLSBURY AND MARY SARGEANT v. THOMAS  
DUGAN'S ADMINISTRATOR.  
AND  
THE SAME v. HIRAM B. CADE AND OTHERS.

No mistake of name will invalidate an instrument or proceeding, unless the person meant can not be identified; bad spelling will not produce such effect.

The names of *Pillsby* and *Pillsbury* are so nearly identical, that proceedings in partition against a defendant by either name, will be good. *Biddulph* may be proven to be another mode of spelling *Puthuff*.

Errors in form are overlooked, when the acts of a court are manifest, and the jurisdiction established.

Nonjoinder of the husband in proceedings for the partition of the wife's land leaves his life estate untouched, but partition against the wife without the husband will bind her unless reversed.

Partition proceedings are analogous to those *in rem*, and publication of notice by advertisement, is sufficient to apprise a party of the proceeding and to bind his interest.

One acting in a court of general jurisdiction, as an attorney in fact for a party, will be presumed to have satisfied the court of his power to act, and the party affected can not impeach the proceedings collaterally, because the fact of such proof does not appear in the record.

**EJECTMENTS.** From Hamilton. These suits depend upon the same title, and were heard together upon agreed facts.

The plaintiff claims two undivided eighths of lot 92, and out lot 20 in Cincinnati. He shows a title in his lessors, by a deed from John Cleve Symmes, dated in August, 1795, conveying the land to them under the names of Abigail Cutter and Mary Cutter. Abigail Cutter has heretofore intermarried with Silas Pillsbury, and Mary Cutter with Phineas Sargeant, but both husbands have deceased, so that the plaintiff is entitled to a recovery in both cases, unless these interests have been extinguished by certain proceedings in partition.

In August, 1805, the following petition was filed in the Common Pleas of Hamilton county. "The petition of the subscribers respectfully sheweth, that John Cutter, late of Cincinnati, died seized of a certain in-lot, No. 92, containing seventy-two perches, and one out-lot, No. 20, containing four acres, situate in the town of Cincinnati, held by purchase from and under the proprietors of the town. In which lots William Woodward is entitled to three-eighths parts;



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Abigail, wife of said William, to one-eighth part; Hepsibeth Foster and Seth Cutter, both of the town of Cincinnati, are each entitled to one-eighth; Abigail Pillsby and Mary Cutter, both of Massachusetts, are entitled to one-eighth part, for which petitioners ask partition, etc.

WILLIAM WOODWARD,  
ABIGAIL WOODWARD,  
SAMUEL FOSTER,  
HEPSIBETH FOSTER,  
SAMUEL CUTTER,

Att'y for Mary Cutter."

The proceedings under this petition were examined by this court, and most questions arising under it were settled in the case reported in 8 Ohio, 87. In these suits it remains to determine whether Mrs. Pillsbury and Mrs. Sargeant were parties so as to bind their respective shares.

V. WORTHINGTON, J. C. WRIGHT, and T. WALKER for plaintiffs, made the following points:

1. That the proceedings in partition do not bind Mrs. Sargeant, as she was no party to the record, except through the agency of Samuel Foster, who shows no authority to act for her. No one can be bound by the acts of another without his consent. The case in 3 Ohio, 521, extends no farther than to hold parties bound by the acts of attorneys at law. Cutter was not an attorney at law, and his authority as an attorney in fact, if it existed, should form a part of the proceedings.

2. As to Mrs. Pillsbury, the proceedings in partition were not against her. She was no party, had no notice, and can not be bound by them. The partition law required the petition to set forth the name and residence of each co-tenant, and forty days' notice by personal service or publication before the term of the court, ordering partition. In this case the petitioners profess to know all the parties, and it does not lie with them to say they brought an improper party before the court by mistake, and that thereby they conclude the real party in interest.

3. Silas Pillsbury, the husband, should have been made defendant, either alone or with his wife, to bind her interest. In 8 Ohio, 87, this court determined that a tenant by curtesy could make partition, and was the proper party to such proceedings.

4. The proceedings do not show that any deed has been executed to Woodward under the partition, and therefore no title passed. 5 Ohio, 455.

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Lessee of Pillsbury et al v. Dugan's Admin'r, and the same v. Cade.

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\*5. In no event can Silas Pillsbury's interest, as tenant by the [119] curtesy, be affected by the partition. He had a life estate, 4 Ohio, 170, and was no party. His death since this suit was commenced, does not destroy the right to recover; that remains, to secure the mesne profits up to his death. 2 Ohio, 304; 3 Wheat. 212.

D. VAN MATER, for defendants, insisted, the partition proceedings sufficiently find Samuel Foster's power to act as the attorney for Mary Sargeant, and conclude her. The power of attorney no more than the deeds, or other muniments of title, go into the record. But she is named in the petition as owner of an eighth, and notice published, which is sufficient to bind her even if Cutter had no power. This applies equally to Mrs. Pillsbury. Notice was ordered by the court, and the cause continued for that purpose, and must now be presumed to have been proven.

The naming Abigail Pillsbury as the owner of one-eighth, and stating her residence in Massachusetts, complies with the law, though she is not described as wife of Silas Pillsbury, and the publication so made would advise him sufficiently to take care of his rights. When sold he had a right to take his proportion of the money. Less strictness is required in partition than in other cases, the object being merely to apportion to each of several owners of land his portion of it. But it is said that Mrs. Pillsbury was not a party to the petition, and is not bound by the sheriff's deed. The objection rests upon a mere mistake in spelling the name, *Pillsby* instead of *Pillsbury*. It was Mrs. Pillsby who was the daughter of John Cutter who was described, and sufficiently so to prevent all misunderstanding, as to who was meant. Besides the name is spelled as it is generally pronounced. If there be a misnomer, the party can not avail himself of it in this collateral way.

B. STORER and C. FOX, same side.

By the Court, LANE, C. J. In adjudicating upon transactions occurring in the early settlement of our state, we must never forget the absence of precedents and system, the different usages introduced by people emigrating from every part of the country, the want of knowledge or neglect of technical learning, and the risk of loss of evidence from the lapse of time. Hence errors of form have always been overlooked, where the acts of a court are manifest, and its jurisdiction established. 3 Ohio, 273; 6 Ohio, 255.

The petition in partition is very loosely drafted. The land is well

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Lessee of Pillsbury et al v. Dugan's Admin'r, and the same v. Cade.

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120] \*described, but the name Pillsbury is spelled Pillsby, and no notice is taken of her husband, although then alive. The non-joinder of the husband, who then held a freehold in the wife's land for their joint lives, and a contingent tenancy by curtesy, left his rights unimpaired. By his decease, this estate is ended, and the wife is bound by a decree against her, until reversed, because a judgment or decree against a femme covert is voidable only on error.

It is not every mistake in names which will invalidate an instrument or proceeding. This effect will follow where the person can not be identified, or where the error is such as to describe another. But words are intended to be spoken; and where the sound is substantially preserved, bad spelling will not vitiate. I remember a case where a lessor in ejectment recovered in the name of Puthuff under a deed to his ancestor in the name of Biddulph, by proving that Biddulph, Bottolph, Potherf, and Puthuff, were different modes of spelling the name of the same person. In the case before us Pillsby and Pillsbury differ little in sound, in familiar conversation, especially when pronounced with the rapidity of utterance usual among the people with whom she then lived. In the statute proceedings for partition, which only define existing rights, without creating new ones, and are not regarded adversary, but analogous to proceedings *in rem*, 6 Ohio, 269, the co-tenant against whom partition is demanded, is not strictly a party. Where he lives beyond the jurisdiction of the court, the publication of notice of the pendancy and objects of the petition, is all which is required. We find, in the case before us, sufficient evidence of notice that a petition was pending, to divide lot 92 and out-lot 20, in Cincinnati, belonging to the late John Cutter of Cincinnati, of which Abigail Pillsby of Massachusetts was entitled to one-eighth. Enough is shown to apprise her of her rights and to bind her by the decree of partition.

The objection to the operation of the decree upon Mrs. Sargeant's eighth is, that no authority appears on the record for Samuel Foster to institute these proceedings as her attorney in fact. The authority of an attorney at law is presumed. 3 Ohio, 521. The power of an attorney in fact, should be shown by proof, but where a court of general jurisdiction is required to exercise its powers upon a state of facts to be proved before it, the requisite proof is presumed to have been made, and the existence of the fact can not be afterwards collaterally questioned. 2 Pet. 163, 449; 3 Ohio, 257, 560; 6 Ohio, 255; 7 Ohio, 259; 8 Ohio, 87. The defendants may take judgment.

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Lessee of Foster v. Dennison, and the same v. Com'rs. of Hamilton Co.

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\* LESSEE OF J. C. FOSTER v. WILLIAM DENNISON. [121

AND

LESSEE OF J. C. FOSTER v. COMM'RS OF HAMILTON CO. AND OTHERS.

A deed may be held to operate in any form of conveyance, that will carry into execution the lawful objects of the makers. Whether the *form* be feoffment, grant, bargain and sale, or release, the deed may enure as either.

An instrument by which the parties acknowledge payment of the consideration, "obligating the grantors to forever quit claim land," sealed, acknowledged, recorded, and possession released to the grantee, and held for thirty five years, is a conveyance.

A deed made in Massachusetts in 1085, by husband and wife, and acknowledged by the wife only, passes the wife's interest in land in Ohio, because it has that effect by the law of Massachusetts.

An acknowledgement of a deed is not a part of the deed itself: it is required only as *evidence* of execution, or as authority for registration. In Ohio, it is required in deeds executed by married women, as evidence of her sealing and of freedom from constraint, and is for their protection.

A husband is competent to make *partition* of the wife's real estate, but the right *he* acquires by the proceeding in partition, does not extinguish her right, which survives to her or her heirs.

A deed by a husband, in which the wife is only named in the testatum clauses relinquishing her dower, though duly executed and acknowledged, operates only upon her dower, and will not pass any separate interest of the wife in the estate.

**EJECTMENTS.** From Hamilton. The first is for one eighth of lot 92, and the second for a part of out lot, 20, in Cincinnati. The plaintiff's title in both these cases is the same, and the title of the defendants depends upon the same facts, so the two could be, conveniently, and were considered together.

In 1795, the premises were conveyed by J. C. Symmes to Seth Cutter, Abigail Cutter, Mary Cutter, Rachael Cutter, Martha Cutter, Hannah Cutter, Hepsibeth Cutter and Abigail Woodward, heirs of Seth Cutter, deceased. The plaintiff holds the interest of Hannah, Mary, and Martha, and Abigail Woodward, and is one of the heirs to Hepsibeth and Hannah. He recovered the original eighth of Hepsibeth, in the suit in this court reported 8 Ohio, 87. He is entitled to judgments for the remainder in these suits, unless the rights have been transferred by the two following deeds: 1. A deed made by Hannah, then wife of Isaac Wetherbe, Rachael, then wife of William Dixon, with their several husbands, and Martha then a widow of Henry Gardner, of which a copy follows:

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Lessee of Foster v. Dennison, and the same v. Com'rs. of Hamilton Co.

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"BOSTON, Nov. 20th, 1804.

"Know all men by these presents, that whereas John Cutter of Cincinnati, territory north west of the river Ohio, deceased, who died intestate, having left two lots of land, lying and being in said town, 122] \*and numbered on the plat of said town, 92 and 20; viz. one half acre lot No. 92. and one five acre lot No. 20; and whereas, I, Isaac Wetherbe, of Boston, Massachusetts, and Hannah my wife, and I William Dixon, yeoman, and Rachael my wife, of Charleston, together with Martha Gardner, widow, of Medford, but all of the state of Massachusetts, being three of the lawful heirs of the abqve mentioned John Cutter, deceased, do for ourselves, our heirs, executors, administrators and assigns, severally agree, for the valuable consideration of twenty-five dollars, to each of us in hand well and truly paid, before the ensealing and delivery hereof, by William Woodward of Cincinnati, we do by these presents oblige and obligate ourselves unto him the said Woodward, as well as our heirs and administrators, to resign, give up, and forever quit claim to him the said Woodward, and his heirs, all our right and claim in the above described lot, together with all the privileges and appurtenances, thereto belonging. Given under our hands and seals."

This instrument is duly sealed, and attested, and recorded on the 25th January, 1805. It is acknowledged by Isaac Wetherbe, William Dixon, and Martha Gardner, only.

2. A deed from William Woodward and Samuel Foster, given in 1808, and duly executed, in the testatum clause of which Mrs. Woodward releases her dower to the grantee, M'Clelland, under whom Dennison holds lot 92.

The objections taken are, 1. That the first deed is a contract only, not a conveyance. 2. That the estates of the wives do not pass by it without acknowledgement. 3. That the last deed affects the dower only, not the remainder of the wife.

V. WORTHINGTON, J. C. WRIGHT, and T. WALKER, for plaintiff. 1. The instrument of the 20th November, 1804, is only a contract for a deed, not a deed. If the intention be clear that the parties designed the deed as a present grant, it should be held a conveyance, otherwise it is to be held a mere contract. 2 Wend. 433; 5 Wend. 26; 12 Wend. 156; 3 Johns, 419, 47, 389, 424; 5 Johns, 74; 10 Johns, 336; 4 Cruise Dig. 69. Where there is a present demise and a covenant for a future one, the paper is held a lease; but if there are no apt words of present demise, but provision for executing a lease,

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then it is held a mere contract for a lease. 10 Johns. 337; 1 T. R. 735; 2 T. R. 739; 5 T. R. 163; 6 East. 530; 2 W. Blk. 973; 3 Ohio, 116. A deed to convey the estate of a married woman, must be executed according to law, and show her \*intention to convey absolutely. 7 Ohio, pt. 1, 195; 9 Mass. 218; 13 Mass. 223; 3 Mason, 347. Judging of this paper, independent of legal decisions, we should not hesitate to pronounce it a simple agreement to convey. No language can be better adapted to express such intention.

2. The deed is not executed according to the laws of Ohio, to pass a legal title, except against Wetherbe and Dixon, for their curtesy. The law in force at the time of its execution, viz., the act of 20th January, 1802, 1 Ch. St. 342, requires deeds thereafter executed, to be *acknowledged* or *proven* according to the laws of Ohio, or of the place where executed. This deed has never been *acknowledged* or proven by Mrs. Dixon or Mrs. Wetherbe, and has but one subscribing witness. Contracts by married women are void unless made in conformity with the statute. 6 Ohio, 335; 6 Wend, 9; Griff. L. Reg. 495; 2 Shep. Touch. 114; 5 Mass. 554, 463, 438; 7 Mass. 20, 14, 18; 4 Mass. 541; 6 Pick. 87; 9 Mass. 143; 8 Pick. 536.

N. WRIGHT, B. STORER, and C. FOX, for Deannison. 1. Whether the paper of the 20th November, 1804, is to be regarded a deed, or a mere contract for one, depends upon the intention of the parties, apparent on the instrument. 12 Wend. 156; 2 Wend. 439; 3 Johns. 47; 5 Johns. 76; 1 Mass. 227. Judging by this rule, no one can suppose the parties expected any other deed. They acknowledge the money paid, and bind themselves, their heirs, etc., to resign, give up, and forever quit claim to Woodward, *all* their right and claim, etc., to the lots and the appurtenances. The parties evidently intended, to give up and quit claim forever, all their right, &c., in the lots, and the instrument seems sufficient to carry the design into effect.

2. As to the intention of Mrs. Wetherbe and Mrs. Dixon. Suppose the paper a contract, and not as such binding upon married women, still in law, after thirty-five years, the contractee in quiet possession, it is a clear unequivocal case, for the *presumption of a deed*. 6 Bin. 419.

3. This deed executed according to the law of Massachusetts, where it was made, binds all the parties to it. 9 Mass. 172, 220; 5 Mass. 463; 7 Mass. 20; 6 Pick. 87; 8 Pick. 32, 536. The abilities and disabilities of married women are regulated by the law of their domicile, which protects their persons. The form of legal titles of real

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124] estate is regulated by the *lex loci rei sitae*, but \*the capacity of the married woman, and the forms which shall protect her incapacity from abuse, are fixed by the law of her domicile. Hence it is not important that our own statute shall have been complied with in executing this paper, as the form of execution to pass the wife's interest in the land conforms to the law of Massachusetts. Story Conf. of L. 127; 8 Pick. 32, 536.

4. But this deed is clearly within our statute. The act of 1802, intends to make valid, deeds executed in other states according to their law. This appears both from the object and language. A deed executed and acknowledged as this, in Massachusetts by a married woman, passes her interest in land, and as our law adopts the foreign *execution* and foreign *acknowledgement* both, the deed is good here.

5. The shares claimed if not generally barred, are so as to lot 92, by partition in pais, evidenced by the conveyances and long continued occupancy by Dennison; and as to Mrs. Woodward's share she united in the deed, and with her husband has ever since continued to occupy other parts of the land, and she must be held to this partition unless relieved from it in equity.

D. VAN MATRE, for the county.

By the Court, LANE, C. J. There is no doubt that Woodward expected to acquire the interest of Martha, Rachael, and Hannah, in the lots, by the deed of 1804. It is sometimes a nice matter to discriminate between an agreement to convey, and a present conveyance: but where the parties intend to pass the title, without any further act, the law will endeavor so to interpret their proceedings as to work this effect. In this transaction the contract of sale is made, the consideration paid, and a deed is given, sealed, acknowledged and recorded, and possession of the land held under it, for more than thirty years; by which, the parties evidently meant to pass the title. Now a deed may be held to operate in any form of conveyance that will carry into execution the lawful objects of the makers. Whether the form be feoffment, grant, bargain and sale, or release, the deed may enure as either. 6 Mass. 32; 4 Kent C. 2d ed. 403. An instrument in the forms requisite for a deed, if it show a consideration paid, and an immediate contract to convey, takes effect in Massachusetts, as a deed of bargain and sale, because it raises a *use*, which is *executed* by the statute of uses. 3 Mass. 573; 6 Mass. 24; 7 Mass. 189. This deed, therefore,

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though in form a \*release, is a substantive bargain and sale, and [125 operates as an immediate conveyance.

It is however claimed, that the deed is inoperative to pass the wives' estate, because it was acknowledged by the husbands only. The acknowledgement of a deed is not a part of the deed itself; it is required by law, either as evidence of execution, or as authority for registration. In deeds executed by the wife in our state, the law makes the acknowledgement the necessary evidence of the fact of sealing, and of freedom from constraint. This ceremony is adopted as a protection to married women; but the legislature has not thought fit to require the same solemnities in deeds executed abroad, but merely exacts a compliance with the forms required by the law of the place of execution. 1 Ch. St. 485, § 3. By the laws of Massachusetts, where these parties resided, and where this conveyance was made, we find a deed signed by husband and wife, but acknowledged by the husband only, is an effectual transfer of the wife's property. 6 Mass. 541; 5 Mass. 438. It seems plain, therefore, that the grantors have complied with the Massachusetts forms, sufficiently to give effect to their deed.

The rights, therefore, of Hannah, Rachael and Martha, having passed to Woodward by the deed of the 20th Nov. 1804, before their conveyance to the lessor of the plaintiff, it only remains to examine if he acquired any title from Abigail Woodward and Hepsibeth Foster. They were married women, parties with their husbands in the petition for partition. In the case heretofore decided, 8 Ohio, 87, we held their interests were not extinguished by these proceedings, but were restored to them or their heirs, after their husbands' deaths. They are now held by the lessor of the plaintiff, unless that portion in lot 92, was conveyed to M'Clelland. His deed was made in 1808, by Woodward and Samuel Foster, conveying lot 92. No mention of the wives is made in the granting part or in the covenants; but in the testatum clause, the grantors, together with their wives (each of whom relinquishes her right of dower) set their names and seals, etc., and the instrument is duly executed by all. At the time of this conveyance, each husband held half of the lot, three-eighths in his own right, and one-eighth in right of his wife; and the rights of the wives were likewise two-fold, viz. a vested remainder in an eighth, and a contingent dower interest in three-eighths. The words of the deed apply to the dower only, and it is not for us to extend them beyond their plain



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meaning. The recovery of the plaintiff is, therefore, limited to the two-eighths of Mrs. Woodward and Mrs. Foster.

Judgment for plaintiffs.

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\*WILLIAM DENNISON v. JOSEPH C. FOSTER AND OTHERS.

A purchaser from a tenant in common, can not throw the owner of a paramount title upon later purchasers of another portion of the common land.

One tenant in common can not work a division of the common property, by conveying his share in a deed defining its limits by metes and bounds. The effect of such deed is to pass to the purchaser the grantor's proportional interest in the part described in the deed.

Tenants making such separation of interests, and their heirs, are bound by it, especially if the deed contains covenants of warranty, and it may be ratified by the co-tenants; but there seems no such relations between earlier and later purchasers, as authorize the former to impose such obligation upon the latter.

As respects heirs, chancery might mould their rights, so as to protect the alienee of their ancestor, but no such principle applies between purchasers.

IN CHANCERY. From Hamilton. This bill is brought to quiet the plaintiff's title to lot 92 in Cincinnati, or to have partition of that lot and out-lot 20, late belonging to the heirs of John Cutter in such form, that the plaintiff who holds a part of the title may protect his possession of lot 92.

The plaintiff holds by purchase from William Woodward and Samuel Foster in 1808. Woodward and Foster at that time claimed a complete title to both lots. There has since been much litigation concerning them, and suits recently decided, 8 Ohio, 87, and in *Lessee of Foster v. Dennison*, ante 121, and *Lessee of Pillsbury et al v. Dugan et al*, ante 117, have established their right to six eighths in fee, and estates for life in the remaining two eighths. The claim of the plaintiff to be quieted in his possession of the whole of lot 92, as owner, is not sustained; but he endeavors to support his bill upon the ground that he was the *first* purchaser from Woodward and Samuel Foster, and has a right to demand such a partition, as will leave his lot entire, by casting upon later purchasers the burthen of paramount claims.

B. STORER, C. FOX, and D. VAN MATRE, for plaintiff, insisted, that as the plaintiff holds a conveyance with warranty for the whole of lot

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92, made when the grantors Woodward and Samuel Foster had possession of and claimed in the same right both that lot and also out-lot 20, equity will secure the rights of all by a partition *equal in value*. Where there are several parcels of land, partition is not required to be made of each separately, but "the *whole of one* estate may be allotted to one, and the whole of another estate to the other, provided that his equal share is allotted to each." 1 Story Eq. 610, § 657; Alnat on Part. 12 to 28; 1 Pr. Wms. 446. And where an equal division can not be made on account of the character of the estate, [127] chancery will compel a compensation in money, by one to other parties, so as to render complete and equal justice. 3 Bibb. 508; 1 Dana, 177; 2 Dana, 456. In making partition the innocent purchaser shall be protected in his possession, and the claimant's portion taken out of the other part of the land. 3 Paige Ch. 474, 553. The most that can be said of the purchasers after the plaintiff is, that their equities are equal to his; and where the equities are equal, the oldest prevails.

V. WORTHINGTON, J. C. WRIGHT, and T. WALKER, for the defendants. The true enquiry in this case involves the right of the plaintiff to throw Foster off from lot 92, upon out-lot 20, for any interest he may have in lot 92, in common with the plaintiff. The facts are these: the plaintiff and Foster are tenants in common of unequal interest in lot 92, and Foster and others are like common tenants of out-lot 20. The plaintiff's title was acquired by the deed from Woodward and Foster in 1818, to M'Clelland, with covenants of title and warranty. Foster has a paramount title to an undivided part of both lots, but the plaintiff has no interest in the out-lot. We concede that a tenant in common may convey his interest in the whole or in a part of an entire tract held in common with others. 2 Ohio, 112; 6 Ohio, 398; 7 Ohio, pt. 2, 129, 131; and that this deed for the whole tract, will pass all the interest he has; 2 Ohio, 113; but such deed conveys nothing beyond its limits. 2 Ohio, 117; 1 Bibb. 510. So in partition, no right is acquired out of the tract divided. 3 Ohio, 23. But we think it clear that one tenant in common has no right to appropriate to himself any part of the common property, and say to his co-tenant, take what is left. 2 Ohio, 118, 120.

Partition in Ohio, is only among common and joint tenants, and parceners, and where one of such tenants has conveyed in parcels, his co-tenant can not claim partition in one proceeding against all the holders of different parcels, but must pursue each separately. 7 Ohio, pt. 2, 131. Chancery has now power to decree partition, but it can-

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only do so between joint or common tenants or parceners of the same tract or parcels of land. *Ib.*—Wright, 168; 3 Bibb. 508. Equity will never make a partition which must operate unjustly. 3 Paige 474, 553; 5 Ohio, 243; 7 Ohio, pt. 2d 120; 3 Bibb. 508. In this case it would be unjust to make the holders of the out-lot bear more than their proportion of the paramount title. Even in case of dower, chancery will see, that the incumbrance is borne by the holder of each [28] tract to which it attaches. Wright, 285. \*Tenants in common are seized *per my et per tout*, in the whole and in each and every part, and neither has a right to appropriate part of the common property to his own exclusive use, and we concede that Woodward and Foster had no right to appropriate to themselves the whole of lot 92, and if they now held the interest in the residue of the common property, Dennison might throw them upon it, if of sufficient value to indemnify them, but inasmuch as they have parted with all their interest in the out-lot, the position of the parties is changed, and there is nothing remaining in them to be so appropriated, to avoid suit upon their covenants, and each party having such covenant is left to resort to it for protection. The plaintiff, then, makes no case for the interference of equity.

N. WRIGHT, in reply. Dennison occupying lot 92, as his own, has made large improvements since the commencement of the ejectment decided last year, for which the occupying claimant law makes no provision, and equity will give him such partition as to secure him the whole of his improvements. He may throw Foster's interest upon out-lot 20, in the same proportion he recovers. A tenant in common has a right in partition to equal share in quantity and value of the common property, though none to have set off to him any particular parcel, but equity may so distribute the shares as to do justice to all concerned. Thus in case of a general lien upon a tract of land sold in parcels, equity will compel the lien-holder to forbear or resort to the parcel first sold until the other parcels are exhausted. In like manner, a creditor having access to but one fund, will turn off a creditor having access to two. I hold it settled, that the location of the shares in partition, is entirely within the control of equity. But suppose one of two parceners to make a conveyance with warranty of the entire interest in the divided half of the tract. This operates at law to exclude the other co-parcener, as to one-half of his share, from the half so conveyed; does it not operate in equity to exclude him entirely from the half conveyed, and locate him altogether on the other half? The

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selling co-parcener, having warranted the half conveyed, can not claim an interest in the other half: for that would operate to throw his co-parcener upon the part he had warranted, and so defeat his own warranty. Equity estops him from this. When partition is sought of the tract so situated, the grantee of the one co-parcener stands, in relation to the other co-parcener, precisely as the man holding a claim on one fund against him who holds a claim on two: and equity turns the latter on to the fund which the other can not reach. Equity [129] locates the share of the grantee on the tract he has purchased, giving the other co-parcener all his legal rights in the residue. Suppose the same co-parcener should, after conveying the first half, convey the other entire half of the common property. In that case, we contend, the tract last aliened must in equity be set off to the other co-parcener, precisely as though the second conveyance had never been made. By the first alienation the rights and equities of the parties are fixed; the half not aliened is charged with the equity against the aliening parcener; he has in equity no right in it, and afterwards conveys it subject to this equity. The first alienee acquires, with his title, the equity to be thus protected, and the second alienation can not defeat it. If those two alienees are before the court for partition, one of them must lose the whole; the question is which shall bear the loss? It is clear the oldest equity must prevail. One of two innocent purchasers is to be sacrificed; which has the best right to protection? The answer is, he who has the oldest equity. 5 J. Ch. 240. The title itself charges the party with requisite notice, if any is required. 2 Ohio, 110. As to one-half out-lot 20, it is held by the Woodward High School, not innocent purchasers for a valuable consideration, but mere donees, mere volunteers, standing in the same relation to the subject as Woodward himself would; thus the court is enabled to do perfect equity, by locating Foster's share on that half without any loss.

By the Court, LANE, C. J. Since the cases heretofore decided upon the interests of these parties, there remains nothing to be settled in this suit, except the claim set up by Dennison, that the first purchaser of a specific defined tract, from a tenant in common, may require from the co-tenant to apart his share from that part of the whole tract last sold by his grantor. That as Woodward and Samuel Foster, who claimed the whole of lots 92 and 20, first sold 92 to M'Clelland, under whom the plaintiff takes title, and as Joseph C. Foster has recovered an undivided fourth in both lots by these suits, the plaintiff asserts a

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right to set off the undivided share thus recovered in that part of the land remaining with Woodward and Samuel Foster, after their sale to M'Clelland, and now held by later purchasers. It is argued, that as between tenants in common all rights are equal; that a partition giving to Joseph C. Foster his proportional value in lot 20, is as just as any for him, and more equitable to the plaintiff, in consequence of his **130]** improvements; and that the other parties have \*no reason to complain, because their titles are later, and taken with a knowledge of his.

One tenant in common can not work a division of the common property, by conveying his share, in a deed defining its limits by metes and bounds. As between the co-tenants and the purchaser, all the effect of such a deed is to give to such purchaser, the proportional interest of his grantor, in that part of the common property described in the deed. 2 Ohio, 113; 6 Ohio, 398. The tenant making this separation of interest, and his heirs, are bound by it, especially if the deed contains a warranty, and it may be accepted and ratified by the co-tenants. 5 Ohio, 244; Wright, 712. But there seems no such relations between earlier and later purchasers, as authorize the former to impose any such obligations upon the latter. The rights and equities of each are equally ample and perfect. The loss which they suffer in this instance, is not from an incumbrance, which may be extinguished, either by the appropriation of the land left with the heirs, or by a contribution among themselves; but is a full and paramount right over a proportion of the land of each. As respects heirs, we would endeavor to mould their rights, so as to protect the alienee of their ancestor, but we find no authority to apply any such principles between purchasers, and we must leave each to sustain his share of the burthen.

The right to relief, therefore, in the point of view contemplated by the bill, is not sustained. There is, however, a fact disclosed by the evidence, and in some degree touched upon by the argument, which is deserving fuller investigation. Mrs. Woodward, before her sale to Joseph C. Foster, covenanted with the executors of Woodward, to release to them all claims arising from or under the conveyances of Woodward. How far this extends; how fully it precludes those who hold her estate, from asserting a right which may ultimately fall upon the estate of Woodward, is a grave question. It will require a change of pleading to present it. The present suit is so complicated with other matters, and other parties, that we believe it had better be dismissed, reserving the right to pursue this enquiry in a new bill.

## \*JAMES CLARK AND OTHERS v. WILLIAM IRVIN. [131]

A verdict is not amendable by the Supreme Court as a court of errors. Neither a plea of guilty in a criminal prosecution, nor the judgment founded upon it, are conclusive against the defendant in a civil action.

Such plea stands like any other confession of a party, and may be controverted.

ERROR to the common pleas of Perry. Irvin sued James, Felix, and J. J. Clark, in the court below, for assault and battery. J. J. Clark pleaded not guilty; the other two pleaded separately *son assault demesne*, on which issue was taken. During the trial before a jury, the plaintiff introduced a transcript of the proceedings before a justice upon a criminal complaint for the same assault and battery, in which J. J. Clark pleaded *guilty*. The court instructed the jury that this plea of guilty was *conclusive* of the guilt of J. J. Clark, and estopped him from proving the contrary. The jury returned a general verdict of guilty. An exception was taken to this charge, and judgment rendered for the plaintiff, to reverse which this writ is brought.

W. W. IRVIN and T. EWING, for plaintiffs in error, contended: 1. That the jury did not pass upon all the issues, and the judgment as to two other defendants was without any finding and must be reversed. They relied upon *Hanly v. Levin*, 5 Oh o, 227. 2. As the judgment is entire, it must be reversed in *toto*, if in part. 2 Tidd. P. 1236; 2 Esp. N. P. 185; 1 Esp. 158; 3 Bac. Ab. Error M. 115, 16; 11 Wend. 91; 8 Cow. 406. The court has no power to amend under the act 33 O. L. 55. But 3. The court erred in stating the plea of guilty conclusive; it is but an admission, and to go in evidence only as other admissions. 1 Stark. Ev. 234, 284; Bul. N. P. 232; Gibb. Ev. 30; 4 M. & Sel. 476; 12 Mod. 339; 2 Stark. Ev. 812; 4 T. R. 255; 1 Phil. Ev. 283; 8 Wend. 440. And 4. If an estoppel, it should have been replied specially. Co. Lit. 226; 3 East. 354; 2 Car. & P. R. 148; 2 Barn & Ald. 662.

H. STANBERRY and H. H. HUNTER, contra. *Hanly v. Levin*, 5 Ohio, 230, only proved that before the acts of assembly, 32 O. L. 20 and 33 O. L. 55, the court had not the power to amend such a verdict. The only real question is whether the verdict substantially finds the issues; if so, the court may now mould it into form. On principle, in actions of this kind, the judgment may be affirmed in part and reversed in part. Dunl. Pr. 492; 1 Stra. 532; 7 T. R. 469; 1

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**132]** Saund. \*109. n. 1. A plea of guilty judicially made upon a criminal accusation is conclusive. 1 Phil. Ev. 259; 14 Mass. 48.

By the Court, GRIMKE, Judge. The verdict in the case below was a general one of not guilty. The jury did not pass upon the issues joined by two of the defendants. This has heretofore been held a sufficient ground for reversing the judgment, 5 Ohio, 227; and the question is, whether under the provision of our two late statutes, this court can amend the defect. The act of the 8th of March, 1831 permits amendments before writ of error sued out. That of the 25th of Feb. 1834, authorizes the court after writ of error to amend defects in the *process or pleading*. A verdict can not by any construction be considered as either process or pleading; and so this case is not within the provisions of that act. By the still later act of March 9, 1835, the courts are authorized before writ error brought to amend such formal defects as are not pointed out in a special demurrer; and even after writ error to amend a judgment or other proceeding. The first part of this section only authorizes amendments to be made where the defect is not relied upon on special demurrer. A defect in a verdict can not be the subject of demurrer. and so that provision does not embrace the case before us. Is it comprehended in the latter clause? That, like the act of 1834, permits amendments after writ of error, only it is broader in its terms, using the words judgment or other proceedings; but the section contains this language also, and yet, as has been before said, a verdict can not be considered as within its scope. The truth is, a verdict does not come within any of our statutes of amendment. The court is there left to exercise the power which it derives from the common law. And there is a peculiar fitness in that power being exercised only by the court who tried the cause. No other tribunal can know the facts which will authorize the amendment.

In the course of the trial, the plaintiff introduced a transcript of the docket of the justice of the peace, showing that a criminal prosecution had been commenced against J. J. Clark, (who had now pleaded not guilty), and that upon that trial he had pleaded guilty. The court below charged the jury that said Clark was estopped, and that the proceedings before the justice were conclusive of his guilt. There is an authority to this effect from the most ancient book of reports which we have referred to in Phil. Ev. 259, but it is at war with the whole current of modern decisions. The record in the original prosecution not being between the same parties, can not be conclusive in *the civil* **[133**

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action, and the plea, considered by itself, only amounts to a confession, which can not have any higher effect than would the record which is founded upon it.

This judgment is, therefore, erroneous as to all the defendants, which renders it unnecessary to decide, whether, if it should be reversed as to some, it must be reversed as to all. 8 Cow. 406; 11 Wend. 91.

Judgment reversed.

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 ELISHA SUTTON AND OTHERS v. THE STATE.

A struck jury may be demanded in a criminal as well as in a civil case.

But where a jury is struck at the instance of the defendant in term time, shorter notice than is provided by law may be accepted by the plaintiff, and if the parties proceed and strike a jury, the defendant can not object the want of longer notice upon a writ of error.

An averment that a defendant *secretly* kept instruments for counterfeiting sufficiently shows a scienter.

The Common Pleas has jurisdiction to punish the offence of counterfeiting foreign coins, circulating in this state as money.

ERROR from the court in bank to the Common Pleas of Huron. The plaintiffs were jointly indicted in the Common Pleas with others. The three first counts charged the having and secretly keeping instruments for coining certain "coins of silver called Mexican dollars, currently passing in the state of Ohio as and for money;" the two last counts charged the making counterfeit coin. The defendants pleaded not guilty, and moved the court for a struck jury, a separate trial, and that the cause be continued to the next term for return of the venire. The court ordered the struck jury returnable during term, and the separate trial, but refused to continue. Levi Sutton was first tried and found guilty on the three first counts, and not guilty on the others. Wm. Sutton was then put upon trial. His counsel moved the court to restrict the evidence for the prosecution to the three first counts, which the court refused, and the jury found as in Levi's case. Elisha Sutton then pleaded guilty as to the three first counts, the other two counts, as to him, being abandoned. The prisoners were then sentenced to the penitentiary, and the foregoing facts appearing in a bill of exceptions, they now seek to reverse the sentence.



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BOALT and WORCESTER, and D. HIGGINS, for plaintiffs in error, contended, 1. The court erred in ordering a struck forthwith, and refusing 134] \*a continuance. Const. of Ohio, 8 Art. § 8; 3 Ch. St. 1708, § 21, 22. 2. The court erred in permitting testimony against William upon the fourth and fifth counts, after his co-defendant had been acquitted upon them. Upon a joint indictment one defendant can not be found guilty on one count and another upon another, they must be jointly convicted or acquitted. Toml. L. Dic. tit. Indictment, Art. 3; 2 Hawk. Pl. C. ch. 25, § 89. 3. The offence charged in the indictment, is a crime against the United States, of which the courts of Ohio have no jurisdiction. Con. U. S. Art. 1, § 8; Acts. 1 Sep. 23d Cong. ch. 71; Act of 25th June, 1834, p. 37; Act of Ohio, 5th March, 1835, p. 39, § 28; 2 East. C. L. 598, 601; Ingersoll's Dig. 498; 1 Kent C. 387; 4 Wheat. 193; Story C. Con. 394, § 550. 4. The charge in the indictment is too indefinite; it is not charged that the defendants had the instruments, knowing their purpose with intent to use them for counterfeiting; nor is it averred that there are any genuine coin of the kind the instruments were adapted to counterfeit. 7 Ohio, 255; 8 Ohio, 231; 1 East. C. L. 196; 2 H. Pl. C. 187; 2 Ch. C. L. 105; 2 East. C. L. 593, 601.

No argument was submitted for the State.

By the Court, WOOD, Judge. The indictment is drawn upon the 28th section of the act of assembly of 1835, providing for the punishment of crimes, 33 O. L. 39, which enacts, "that if any person shall counterfeit any of the coins of gold, silver, or copper, currently passing in this state; or shall utter or put off counterfeit coin or coins, knowing them to be such; or shall make any instrument for counterfeiting any of the coins aforesaid, knowing the purpose for which such instrument was made; or shall knowingly have in his possession and secretly keep any instrument for the purpose of counterfeiting any of the coin aforesaid, every person so offending shall," etc. The first count of this indictment charges, that the defendants did knowingly and willfully have in their possession and secretly keep, on bogus, one press, one pressing machine, one stamping machine, one set of dies, etc., the same then and there being instruments for the purpose of counterfeiting certain coins of silver called Mexican dollars, the said coins then being coins of silver currently passing in the said state of Ohio, contrary to the statute, etc. The third and fourth counts are substantially like the first. We can discover no lack of power in the legislature to punish this offence.

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Sutton and others v. the State.

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2. Did the court below err in ordering a jury to be struck forth-  
\* with? During the term of the court, the defendants applied [135  
for a struck jury, which was ordered, the clerk to attend to striking  
the same in the presence of the defendants and their counsel, which  
was done, and the panel thus returned, constituted the jury, except  
two who were excused, and their place supplied, in court, by talesmen.  
The act relating to juries, 29 O. L. 99, which we think extends to  
criminal as well as civil cases, provides that whenever a struck jury  
is ordered by the court, the party applying shall give at least eight  
days' notice to the opposite party, of the time of striking the jury.  
In this case, only three days were allowed. But if there was any  
thing erroneous in this, it was in allowing the struck jury at all. The  
indictment was presented at June term, and the jury was not applied  
for until the November term, when the cause was for trial. By delay-  
ing the application for the jury until November term, when there was  
not time to give the notice, he waived his right to it, and could not by  
such application force a continuance of the case until the succeeding  
term. But it was the opposite party who was entitled to the notice,  
which they had a right to waive, and the defendant can not object that  
the time was waived.

3. Did the court err in refusing to limit the evidence for the prose-  
cution to the three first counts in the indictment? It is difficult to  
perceive any good reason for so limiting the testimony, and none is  
shown us. The two last counts were for distinct offences of the same  
grade and punishment, and were well joined. But the defendants  
could not object, because they were acquitted on those counts, and  
were not prejudiced by the evidence.

4. Is the indictment defective for want of an averment that the  
defendants knew for what purpose the instruments were adapted, or  
kept? The draftsman of this indictment has followed the precise  
language of the statute, which as a general rule is sufficient. There  
may be exceptions to this general rule, but if so, the case before us is  
not one of them. In the first and second counts there is an averment  
that the defendants knowingly and willfully, had the instruments in  
possession, and secretly kept them. In the third count, it is averred,  
that the defendants secretly kept the instruments, knowing the pur-  
pose they were intended for. If either count is good, there is enough  
to sustain the sentence. Admitting that in this class of cases, guilty  
knowledge is the essence of the crime, is it not sufficiently averred?  
The adverb implying knowledge, is expressed in one part of the sen-

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tence, and understood in the other ; but if it were not, its place is supplied by another equally significant, secretly. Secretly, as used in 136] the indictment, \*implies the guilty knowledge. This is fully sustained by *The King v. Fuller*, 1 Bos. and Pul. 186, where it was alleged that the defendant procured another to commit the crime, and held that the procuring imported a scienter of itself. We hold this indictment substantially good, and we must take care, that while we secure the citizen the protection of his legal rights, we do not give force to objections that would be a reproach to the law, where no injustice appears to have been done.

Judgment affirmed.

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**THE PENNSYLVANIA AND OHIO CANAL CO. v. THOMAS D. WEBB.**

In assumpsit for instalments of stocks which are payable on the requisition of directors and on the publication of notice, the facts of requisition and publication must be set forth with convenient certainty of time and place.

Where a defendant demurs and tenders issues of fact to the same pleading, he should be put to elect one, and abandon the other.

*Quere ?* Where A. subscribes stock in a canal company, authorized to construct a canal from the Portage Summit of the Ohio canal, and the legislature afterwards authorize the construction, from *some other point* of the Ohio canal, is A. liable to pay up his subscription ?

**ASSUMPSIT.** From Trumbull. The declaration contains two counts : one for instalments due on stock in the company subscribed by the defendant, setting forth the circumstances ; the other general for money due on stock, etc., and the common money counts. The defendant demurs generally to the declaration, pleads the general issue with notice of special matter ; and also two special pleas in bar, first, that when the defendant subscribed the stock, the law provided that the canal should commence on the Portage Summit of the Ohio canal, and afterwards the plaintiffs by covin procured an alteration of their charter, under which it had been determined against the consent of the defendant, that the canal should not commence at said Summit ; and second, like the first, omitting the charge of covin in procuring the alteration of the charter. The plaintiffs join the general issue, and demur generally to the special pleas. The demurrers on both sides are joined.

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CROWELL, for plaintiffs. The defendant's contract is in these words. "We whose names are hereunto subscribed, do each of us promise to pay to the president, directors and company of the Penn-\*sylvania and Ohio canal company, the sum of one hundred dol- [137] lars for every share of stock affixed to our names, in such manner and proportions, and at such times, as shall be determined by the company, in pursuance of their acts of incorporation." This is an express contract upon sufficient consideration, and although the charter authorizes the company to forfeit and sell the stock for non-payment, it is not bound to do so, nor so to aver to sustain their right to recover. The charter obliges them to pay as the directors require, etc. 9 Johns, 217; 2 Hall L. J. 231; 1 Bin. 70; 6 Pick. 45; 5 Mass. 80. The amendatory law must be taken as operative; you can not between individuals enquire "respecting the corruption of the sovereign power of a state;" an issue joined upon that allegation, would therefore be immaterial, improperly pleaded and not confessed by the demurrer. Fletcher v. Peck, 6 Cr. 87. In the original charter, the state expressly reserved the right to alter the course of the canal as might be deemed expedient. This has been done, and the acts of the directors under the amended act bind all the stockholders. Ang. and Ames Cor. 121; 6 Ohio, 126; 2 Penn. 181; 1 N. Hamp. 44; 8 Mass. 268; 10 Mass. 384, 390; 2 Kent C. 236; 4 Hen. and M, 215.

T. D. WEBB, and G. SWAN, for defendant. The writ shows the stock valuable, and the only remedy of the company is to sell it. The provision that they *may* make such sale, is imperative, and in a statute the same as *shall*. Salk. 409; Cro. Eliz. 654; Comb. 220; Vern. 152; 1 Pet. 64; 1 Swift. Dig. 13. The charter is a contract, and the legislature had no power to alter it, except by consent of all the parties in interest. Bac. Ab. tit. Corp. B. 3; 3 Bur. 1837; 4 Bur. 2227; 2 Conn. 579; 1 Swift. Dig. 71; 4 Johns. Ch. 597; 2 Penn. 184; 1 N. Hamp. 44; 8 Mass. 262, 272; 10 Mass. 384, 390. The declaration is defective for not averring the call of instalments by the directors and notice to defendant, and because no consideration for the promise is shown. No recovery upon such a subscription can be had on the common count. 1 Ch. Pl. 324; 2 Ohio, 160, 439; 3 Ohio, 226, 525; 4 Ohio, 446; 1 Hall L. J. 146; 14 Johns. 195.

By the Court, LANE, C. J. The practice of presenting issues of fact and law to the same pleading at the same time, which prevails in one or two circuits, is very loose. In our opinion the party pleading

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should be put to elect one and abandon the other. As the par-  
138] \*ties have in this case argued all the questions; we will examine  
the whole.

The plaintiffs seek to recover the amount of the defendant's subscription to their stock. The declaration sets forth that the plaintiffs were incorporated to construct a canal between certain points therein named, upon certain routes and upon certain conditions; that books of subscription were opened and the defendant subscribed ten shares of their stock, by which he became liable and promised to pay it, in such instalments as the directors might require; that the company duly organized and appointed officers; and that defendant has been called upon, and duly notified by publication in newspapers of general circulation, to pay the several instalments, amounting to one hundred dollars on each share, the last of which publication was thirty days before suit, by means whereof he became liable, and promised, etc. The defendant sets up in his special plea, that when he subscribed, the act of incorporation provided, that the canal should commence at some such suitable point on the Portage Summit, as the Ohio canal commissioners should direct; that the powers of the canal commissioners were transferred to the board of public works; that certain persons, after the subscription and without his knowledge and consent, by fraud and deception, procured an act of the legislature, repealing the said provision, and authorizing either the board of public works or the canal commissioners to fix the intersection with the Ohio canal; and that afterwards, before suit, said board did determine the canal should not terminate at any point on the Portage Summit, against defendant's wishes or consent.

The first question arising upon the demurrers is, upon the sufficiency of the declaration. The 15th section of the act of incorporation provides, that "each subscriber shall be bound to pay, from time to time, such instalments on his stock as the president and directors shall require, they giving at least thirty days' previous notice of the time and place of making such payment, in at least one newspaper of general circulation in each of the counties through which the canal may pass." These facts, viz. the requisition of instalments, and the notices of the times and places of payments, being conditions precedent upon which the instalments become due, are facts to be set forth with convenient certainty, and averments of time and place. The pleader has attempted to save labor, by asserting in one broad allegation, that the defendant had been called upon and duly notified "by publication in newspapers

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of general circulation, in the counties through which the canal passes, from time to time, between the 6th of July, \*1835, and the 25th [139 of July, 1837, to pay the several instalments, amounting to one hundred dollars per share, at the times and places specified therein." This is too general, as to the publication of the notices, presenting no issuable points to the defendant, and all averment of the requisition by the directors is omitted. Nothing farther is necessary to decide the defendant's demurrer in his favor.

The parties have argued another question. The act of incorporation as passed, was to construct a canal between the Portage Summit of the Ohio canal, and the Pennsylvania canal. The amendment authorizes a change in the termination, from the Portage Summit, to such point on the Ohio canal as the board of public works shall direct. How far the Portage Summit terminus is an element of the contract, or what latitude of interpretation the phrase "Portage Summit" will bear, we need not now decide. It is not every minute change which will absolve a subscriber from his engagements. In works of this kind, some power of regulation is retained by the legislature, some *discretion* is confided to agents who execute the details. Where the subscription is general, unincumbered with conditions, perhaps the stockholder has no reason to complain of any line of transit, which starts from the same point of business, accommodates the same travel and transportation, and substantially subserves the same general interests. Perhaps the use of the Ohio canal as a part of the line of communication between these points is not beyond the due discretion of the commissioners.

Cause remanded, with leave to amend.

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 E. BRIGHT v. G. CARPENTER AND C. SCHUER.

Where a stranger to a promissory note endorses it in blank at the time of making it, the payee of the note may sue him with the maker, as a joint maker of the note, and he is entitled to the privileges of a surety.

Such blank endorsement may be filled at any time in form to oblige the endorser as principal, or the court may regard it as so filled up.

Parol proof is admissible to show the intention of the parties as to the extent of the endorser's liability.

ASSUMPSIT. From Fairfield. The suit is against the defendants as joint makers of a promissory note. Upon non-assumpsit the following

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note was offered in evidence : \$290, Lancaster, Ohio, July 27th, 1838. Ninety days after date, I promise to pay to the order of E. Bright, at 140] the bank of Cleveland, Ohio, two hundred and ninety \*dollars, value received. G. Carpenter." On the back of the note the name of "C. Schuer," is endorsed in blank. The defendants objected to this evidence, on the ground that it was only the note of Carpenter, Schuer being only a *guarantor*. The plaintiff then offered to prove by oral testimony, that Schuer, when enquired of how his name came upon the note, stated that Carpenter brought it to him, saying he was indebted to the plaintiff in that amount, and had funds to pay, but the plaintiff would not take them, but preferred a note with security for the debt, and that he put his name on the back of the note at Carpenter's request, he giving assurance that he would pay it in a short time. To the competency of this evidence, Schuer objected. The admissibility and effect of this evidence, is now for the consideration of the court.

HART and BORLAND, for the plaintiff. The note was clearly admissible. The forms of making and endorsing between the original parties, do not preclude enquiry. *Douglass v. Waddle*, 1 Ohio, 421, is exactly in point. The explanatory evidence should have been received. Schuer is liable under the circumstances as joint promiser, and, as suppletory to the *form* of the note, in showing him so liable, the evidence was offered. 9 Mass. 315 ; 11 Mass. 440 : 17 Johns. 326, 329 ; 2 Ohio, 430 ; 8 Pick. 122, 127, 130 : 5 Mass. 361, 346 ; 13 Johns. 175 ; Chit. on B. 433 ; 4 Pick. 387.

H. H. HUNTER, for defendants, contended that the note offered in evidence was not the one described in the declaration. Schuer is not a joint maker. We think this court so decided in *Green v. Dodge and Cogswell*, 2 Ohio, 498, where the note was originally exactly like this. But the evidence excluded, if admitted, will not make out the case declared on, of a joint note ; but one of an original undertaking by Carpenter, and a collateral one by Schuer. So it would appear, if what is proposed to be proved was written out on the back of the note.

By the Court, LANE, C. J. The plaintiff can not recover under this form of declaration, except by showing that Carpenter and Schuer are joint makers of the note given in evidence. He insists that proof of this fact is presumed by the form in which they became a party, especially when accompanied with the proposed testimony showing that Schuer intended to become a surety, and repelling the presump-

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tion of his being an endorser. The defendants rely upon the [141] form of the paper as constituting a guaranty or collateral undertaking by Schuer; which being in writing or implied by law, can not be altered by parol. This form of mercantile paper is not unusual in business, and it seems strange that the precise character of the signer on the back of the note, has not been long since established with certainty. The cases cited by the diligent counsel in this case do not so settle the question. Those from Massachusetts, determine that where a person, not a party to the note originally, signs his name upon it in blank at the time of its execution, he becomes, by relation, a party, and may be proceeded against as maker, and that the note itself furnishes presumptive evidence of this relation, by the application of the rule, that a contract is construed most strongly against the person bound. 3 Mass. 374; 5 Mass. 358, 546; 7 Mass. 58; 14 Mass. 316; 8 Pick. 122. In a late case, *Dean v. Hale*, 17 Wend. 214, it was held, that where an endorser of a promissory note payable to bearer, was privy to the consideration, he may be charged directly as *maker* or as *endorser*, and that a bona fide holder of such a note, endorsed in blank, may fill up the endorsement in any form consistent with the intent of the parties, and numerous authorities are there cited to support the decision. The endorsement in the case before us, being in blank, may be looked upon as filled up to conform to the plaintiff's declaration, or may be in fact now so filled up.

We believe the principle running through these cases entirely conformable to the law merchant, and calculated to secure the legitimate rights of all parties. If a person not a party, give his name to a note already existing, his engagement is collateral only, and he is to be held as guarantor; but if such a person sign his name to such a paper at the time of its execution, without prescribing the limits of his responsibility, he authorizes the holder to treat him as a maker, and is as much bound as if his name was written under that of the principal. In the case before us, Schuer need not be treated as a guarantor: he is only entitled to the privileges of a surety. In adopting this rule, we contravene no decision made in our own state. *Green v. Dodge and Cogswell*, 2 Ohio, 498, is in no way impugned. In that case, either the holder or the person bound, had set out the terms of the endorser's liability by filling the blank, and the law decided relates only to a case where the character as guarantor is ascertained. The case of *Stone v. Vance* and others, 6 Ohio, 246, turned upon a peculiar state of facts, which repelled the presumption of any joint undertaking between the second and third defendants. 139



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The parol evidence offered by the plaintiff is unnecessary for his [142] \*recovery. But in cases of blank signatures of this kind, such testimony is admissible, because it is consistent with the contract either to show the intention of the parties as to the extent of the liability, or to repel the ordinary presumption against such endorser. Judgment for plaintiff.

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## LESSEE OF LUKE WALPOLE v. PETER INK.

When a judgment creditor levies on only a part of the debtor's land, he loses his preference as to other lands, first levied on by other execution creditors. A writ of certiorari is adopted in Ohio to correct such proceedings in inferior courts, as are not in conformity with the common law. The reversal by the Supreme Court, of an order setting aside an order confirming a sheriff's sale, necessarily affects those claiming against the sale. A judgment creditor who is himself the purchaser at sheriff's sale, is affected by error in the judgment under which he acquires title.

**EJECTMENT.** From Knox. Both parties derive title under sheriff's deeds. The land was formerly owned by Talmadge. Walpole recovered a judgment in the Supreme Court of Knox, in September, 1826, for \$8,445 28, against Talmadge. Execution issued and a levy was made, and no entire year has since elapsed, without execution upon the judgment being in the hands of the sheriff of Knox or Coshocton counties. No levy was made on the land in controversy, upon such executions. At September term, 1831, the Supreme Court in Knox, pronounced a decree in Walpole's favor, setting aside a conveyance by Talmadge to one Beers, of the land now in controversy, as a conveyance in fraud of Walpole's judgment. On the 27th of December, 1831, Walpole took out a new execution, and on the 28th of January, 1832, levied upon the land, which was sold by the sheriff; Walpole became the purchaser, had the sale confirmed, and received the sheriff's deed. On the 22d of October, 1831, Talmadge confessed two judgments, one in favor of one Dalrymple, and the other in favor of one Struble. Executions were issued upon these judgments the 29th of October, 1831, levied upon the land in controversy, 17th November, 1831, which was afterwards sold by the sheriff, sale confirmed, and conveyed to J. W. Warden, who conveyed to Ink. In 1832, the court

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Lessee of Walpole v. Ink.

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of Common Pleas set aside this sale ; but that order was reversed by the Supreme Court, in September, 1833. Wright, 447. A verdict was taken *pro forma*, subject to the opinion of the court on the facts stated.

\*C. B. GODDARD, CONVERS, and MITCHELL, for the plaintiffs, in [143] insisted that the proceedings under the writ of certiorari were invalid, so far as used as a writ of error ; that it was improperly sued out by one not a party to the proceeding, and to those points, cited a number of authorities. They also claimed that Walpole never lost his lien on the land ; Talmadge's fraudulent deed, which merely embarrassed it, was vacated by the Supreme Court, and then the lien of the judgment attached in full force, and so continued until his purchase ; which can not be defeated by the judgments confessed between the date of that decree and the levy. The case of Hubbell v. Broadwell, 8 Ohio, 120, does not conflict with this assumption. That was a case in equity, and this is at law.

H. B. CURTIS, and SAYRE, for the defendant. Walpole's judgment did not continue a lien on the land. It was lost by delay. The recovery was in 1826, the levy in 1832. In the mean time proceedings were had to set aside the fraudulent deed to Beers, which succeeded in 1831. It is said Walpole's judgment never properly attached as a lien, until the fraudulent deed was declared void. This seeks to place the land in the condition of that purchased after judgment. The decree gave Talmadge no new estate, it merely removed a clause from the title. A judgment lien could not be affected by a fraudulent deed. Wright, 700. But if held newly acquired, then the judgment was no lien until levy, which was after the other judgments under which the defendant claims, were confessed, and attached as a lien. 1 Ohio, 313 ; 4 Ohio, 92 ; 2 Ohio, 70, 396. The reversal of the order confirming the sale to Warden, does not aid the title of the plaintiff.

By the Court, GRIMKE, Judge. The question made, whether the Supreme Court had jurisdiction of the writ of certiorari, it is hardly necessary to examine. No principle is better established than this, that where an inferior court proceeds according to the course of the common law, its proceedings are revised by writ of error ; and when it does not proceed in that manner, its orders are only examinable by certiorari. In England, the remedy by certiorari is two-fold ; to remove a case for trial into the court above, or merely to enquire into the correctness of its orders. We have dropped the first mode, and

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adopted the last. There was no judgment upon which a writ of error would lie, but only an order, and for that reason the writ of certiorari [144] was the proper remedy. The case is also free from any \*embarrassment in consequence of the suit in chancery; for, admitting that the commencement of the lien of Walpole's judgment should be referred to the period when a decree was pronounced, the question still remains, has he a preference as regards other judgment creditors? The lien as between the debtor, and a purchaser from him, may have been preserved, while at the same time it may have been lost as between Walpole and other execution creditors.

It appears that this judgment was rendered in September, 1826, and that no entire year has since elapsed, when executions were not held either by the sheriff of Knox or of Coshocton counties. These executions have been levied on other property, but there was no levy on this land, until after the levy in favor of Dalrymple and Struble. Under these circumstances, although the lien of Walpole's judgment may still have existed, his preference as an execution creditor was gone. Wright, 447. But Walpole purchased during the existence of the order of the court of Common Pleas, which determined the priority of his right. As that order was afterwards reversed, he must necessarily be affected by the consequences. It is not the case of a purchase under a judgment. As to that, the rule in England is sometimes thus stated: that where a judgment is reversed, it does not vacate the sale of personal property, but where the execution is levied on land, the title is vacated. The reason why the rule is thus stated, is that where land is seized, it is never sold, but is extended, and delivered to the execution creditor. And if this were a sale under a judgment, and that judgment had been reversed, perhaps some analogy might be drawn between the two cases, if a purchase by a judgment creditor under execution in Ohio, is the same as an extent in England. But it is unnecessary to give any opinion on that point; as it was an interlocutory order, and not the judgment which was reversed.

Judgment for defendant.

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 Lessee of Avery v. Dufrees, Munsell and others.
 

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**\*LESSEE OF HENRY AVERY v. DUFREES, MUNSELL AND OTHERS.**

Under the law of 1816, regulating the duties of executors and administrators, equitable interests in land, were assets for the payment of debts, and could be sold as real estate, by order of the court granting administration.

A perfect equity in lands, held by an intestate, passes to his heirs by descent. As a general rule in ejectment, the legal title prevails; but *quere*, if a trust be established, can not the beneficiary recover against the trustee holding a more naked title?

**EJECTMENT.** From Miami. The case was submitted to the court in Miami, upon an agreed state of facts, and now for decision upon those facts; but as they are fully stated in the opinion of the court, it is unnecessary to repeat them here.

**HOLT**, for plaintiff.

**ODLIN**, and **SCHENCK**, for defendants.

By the Court, **HITCHCOCK**, Judge. The lands in controversy are parts of fractional sections 27 and 28, in T. 1, R. 11, in Miami county. They were originally entered by William H. Harrison, and assigned to D. Symmes, who paid for them, and was entitled to a final certificate and patent. Symmes died seized of the land, previous to 1818. On the 26th June, 1832, the heirs of Symmes, in consideration of one dollar, conveyed these and other lands, amounting in all to about three thousand acres, to N. Longworth and Henry Avery. Longworth afterwards conveyed his interest to Avery. On the 22d November, 1836, the land was patented to Avery as "*assignee of W. H. Harrison*," and on the 15th September, 1837, a patent issued to Avery, for the north half of fractional section No. 27, describing him as the "*assignee of D. Symmes, deceased, assignee of William Henry Harrison*." From this it will appear that Symmes died seized of a perfect equitable title to the land in controversy, which descended upon his heirs, and had a patent been issued to these heirs, they would, according to the authority of the case of *Bond v. Swearingen*, 1 Ohio, 395, have been in by descent and not by purchase. Instead, however, of receiving a patent themselves, they transferred their interest to Longworth and Avery, and the patents were issued to the latter. This transfer included not only the premises in controversy, but other lands amounting in the whole to about three thousand acres, while the consideration paid seems

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*Lessee of Avery v. Dufrees, Munsell and others.*

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to have been but one dollar. A consideration, we should suppose, somewhat inadequate, if the heirs of Symmes entertained the opinion that **146]** they had any interest in the lands transferred. The inadequacy of consideration, however, has nothing to do with the present case. The question here is as to the legal title. And the lessor of the plaintiff claims title under the patents from the government of the United States, before referred to

The defendants derive title under a sale by the administratrix of Daniel Symmes, made in 1819, pursuant to an order of the court of Common Pleas of Hamilton county, the court by which the letters of administration had been granted, and deeds in pursuance of such sale. There is no controversy but that the proceedings preliminary to the order of sale were all correct; nor is it disputed but that the sale itself was legal, provided the court of Common Pleas of Hamilton county had power to make the order: and provided the interest of Symmes in the premises was such, that it could be sold by his personal representatives.

It is insisted by the counsel for the plaintiff, that the title of the defendants is defective, because, 1st. the land being situate in Miami county, the court of Common Pleas of Hamilton county had no jurisdiction to order its sale. 2nd. The interest of Symmes being an equitable interest, merely, could not legally be sold by an administrator, pursuant to an order of court; or in other words, that under the law in force at the time this sale was made, equitable interests in land, were not, in the hands of an administrator, assets for the payment of the debts of his intestate. These are the only questions argued by counsel, and it seems to be conceded that the decision of the case must depend upon their determination.

So far as respects the first point made, it has already been settled at the present term, in the case of *Lessee of Avery v. Pugh*, ante, 67, in which it has been decided that under the law of 1816, the law under which this property was sold, the court of Common Pleas granting letters of administration, had power to order the sale of land, where such sale was necessary to pay the debts of a decedent, irrespective of its locality.

The second point made involves the enquiry, whether under the law in force in 1819, the time of the sale of the premises in controversy, equitable interests in land were subject to the payment of a decedent's debts, in a regular course of administration. It is insisted by the counsel for the plaintiff, that such interest can not be thus subjected

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Lessee of Avery v. Dufrees, Munsell and others.

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because the proceedings to procure an order of sale of real estate, is a purely legal proceeding, and as an equitable interest in land can not be sold on an execution at law, therefore a similar interest can [147 not be sold in virtue of an order of the court of Common Pleas acting as a court of Probate, that order being the result of a legal proceeding. There is more plausibility than force in this argument. The jurisdiction and the practice of the several courts in this state, are regulated by statutes, and in order to ascertain their powers, we must look to those statutes. It is true that equitable interests in lands can not be sold on executions at law, and one reason is, that ample powers are possessed by the courts, acting as courts of chancery, to subject such interests to sale in satisfaction of judgments. But there can be no doubt but that the general assembly have power to direct such interests to be sold on executions at law; and they have equal power to direct such interests to be sold by executors or administrators.

The law in force at the time of the sale of the premises by the administratrix of Daniel Symmes, was the act of January 25th, 1816, "for the proving and recording wills and codicils, defining the duties of executors and administrators," &c. 1 Ch. S. 926. This statute prescribes that the personal property of a decedent, with but little exception, shall be appropriated to the payment of his debts. And if the personal property or estate be insufficient for this purpose, then it is made the duty of the court granting the letters of administration, to direct the administrator "to sell so much of the *real estate* of the deceased, as shall be sufficient to discharge all such demands, after the money arising on the sale of personal property has been applied thereto." What is *real estate*? I take it to be the interest which a man has in lands, tenements or hereditaments. If it be such an interest as can be enforced in a court of law, it is a legal interest or estate. If it be such as can only be enforced in a court of chancery, it is an equitable interest or estate. But in either case it is "real estate" or property. In the case of *Livingston v. Newkirk*, 3 John. C. R. 316, the chancellor says "an equitable interest, founded upon articles for a purchase, and which a court of equity will specifically enforce, is real estate, which will pass by a devise subsequently made, and if there be no devise, will descend to the heirs, and the executor must pay the purchase money for the benefit of the heir." If such an equitable interest be real estate, certainly an equity like that of Symmes' in the present case, must be real estate. Before his death, the entire

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Lessee of Avery v. Dufrees, Munsell and others.

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purchase money had been paid to the government, and nothing remained but that the patent should issue.

Again, equitable interests in land, are by our legislature treated as real estate. Of such interests by our statute, the widow is to be [148] \*endowed, regardless of the debts due from her husband's estate, although she is not entitled to a distributive portion of the personal property, until after all debts shall have been paid.

If an equitable interest in land is real estate, and we think it is, then it might be sold by an administrator under the law of 1816. And such sale would vest in the purchaser all the title of the intestate at the time of his death. In the case under consideration, the defendants, by their purchase in 1819, acquired all the title which Daniel Symmes had to the premises at the time of his death, which was a perfect equitable title. In the opinion of the court, the points made and argued by counsel, are with the defendants. But still there is a difficulty in the case. Although Symmes was entitled to a patent for the lands in controversy, none was ever issued to him. After his death, and after the sale by his administratrix, of all his interests to the defendants, his heir assigned to Avery, and the patent was issued to him as the assignee of those heirs. By this patent the legal title to the land is vested in Avery, and in ejectment, as a general rule, the legal title must prevail. Avery takes this legal title, however, under all the circumstances, subject to all the incumbrances which would have rested upon it, had it been vested in the heirs of Symmes. In their hands it would have been a naked legal estate. They would have taken by descent and not by purchase, and had their ancestor conveyed with warranty, it would have enured to make good the title of his vendees. But their ancestor did not convey. He died seized of the premises, having a perfect equity therein. By the sale of the administratrix, this equity was vested in the purchasers, and they were entitled to the patent. After this sale, neither the heirs of Symmes, nor their assignee, with notice, could take the legal title in any other character than as trustees for the purchasers.

This view of the case is not referred to by counsel, and from their statement of the facts we are led to the conclusion, that they do not wish it decided upon this point. Lest however we should be mistaken in this, we will remand the case to the county, and should the plaintiff persist in prosecuting, opportunity will be afforded the defendants of seeking relief in equity.

Cause remanded.

**\*LESSEE OF HENRY DARBY v. WILLIAM J. CARSON. [149**

An order of maintenance under the bastardy act is a judgment of a court of competent jurisdiction, and can not be collaterally impeached.

Such order may be enforced by execution as in other cases, the security given under the act being resorted to only in case of the inability of the defendant.

**EJECTMENT.** From Hamilton. The lessor of the plaintiff claimed tile under a sheriff's deed upon a sale made on execution, under the following judgment in the Common Pleas, at August term, 1825, upon a complaint under the bastardy act, viz. : "Therefore it is considered and adjudged by the court, that said Margaret Moore recover against the said J. D. Carson the sum of two hundred dollars, to be paid in eight annual instalments as follows, to wit, (specifying the times of payment,) together with eighteen dollars and sixty-three cents for her costs and charges, by her about her suit in this behalf expended, by the court now here to the said plaintiff with her assent adjudged ; and that she have execution thereof." Security for the performance of this order was given according to the statute. The defendant objected to the execution as void, inasmuch as no execution could issue upon the judgment. A verdict was taken subject to the opinion of the court upon the law arising on this state of fact.

C. FOX, for the defendant, contended, the execution was void. The statute requires a bond with security to be given to perform the order, and remedy must be sought by suit on the bond ; and the only course in case he refuse, provided for in the law, is to commit the defendant to jail until he comply with the order. 2 Ch. St. 1423. There is no provision for execution, but when the bond is given the order is satisfied.

O. M. SPENCER, for the plaintiff, insisted that decision of the Common Pleas, in the bastardy case, concluded the whole matter, and was a final judgment, and upon common principles to be enforced by execution. In Co. Lit. 154 a. 289 b. an execution is defined to be "the obtaining the actual possession of any thing acquired by judgment of law." It is called "*functus et finis leges*." Without it a judgment would be worse than a nullity. Wherever power is given to a court to make an order or render a judgment, the grant *ex vi termini* includes the means of enforcing it by execution. The statute supposes the order pronounced, when the accused is present, and seeks to hold the



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Lessee of Darby v Carson.

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150] person until security be given to perform the order, and \*hence orders him committed till he find security. This is cumulative only, the omission to require security would not vitiate the order, nor will the entry of it throw the plaintiff upon a new suit against the security on the bond, if the money can be made of the person who should pay on execution without. But the award of execution in this case is a judicial act, upon a subject and between parties within the jurisdiction of the court, and the error, if any, can not be enquired into collaterally. 3 Ohio, 257, 561, 305.

By the Court, WOOD, Judge. The proceedings in the court of Common Pleas are founded on the act for the maintenance and support of illegitimate children. 2 Ch. St. 1423. The sixth section of this act provides, "that if the jury shall find the defendant guilty, he shall be judged the putative father of said child, and shall stand charged with the maintenance thereof, in such a sum, or sums, as the court shall order and direct, with the payment of costs of prosecution, and the court shall require the reputed father to give security to perform the aforesaid order," etc.

It is contended for the defendant, that no execution can issue upon an order of the court under this law, the remedy being on the bond only; and therefore, that the execution in this case and the proceedings under it are void. It must be admitted that the court entry upon the verdict, varies from the usual form, and is not in exact conformity with the statute, which requires that "the defendant shall be adjudged the reputed father of said child, and be required to give security" for its maintenance, as the court shall direct. In the record before us, there is no express adjudication against the defendant as "the reputed father," nor requisition of security; but a direct judgment for the recovery of two hundred dollars in instalments. Suppose the entry erroneous, it can not be denied that the court has jurisdiction of the subject and of the parties; therefore they are not void, but must be regarded valid until reversed upon writ of error. 3 Ohio, 305.

The question then arises, Does this judgment or order authorize the execution and sale of the land in dispute? There is a formal judgment for two hundred dollars and costs, which seems authorized by the provision of the statute, that "the defendant shall stand charged in such sum or sums as the court shall direct." This entry is a judicial act, and contains an express award of execution. This is a judgment, and valid until reversed. It is the determination of the law on the

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 Lessee of Anderson v. Brown and others.
 

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facts of the case, Jac. L. Dic. title judgment. An execution is properly defined "the obtaining of actual possession of any thing acquired by judgment \*of law; and necessarily goes on all final judg [151] ments. Co. Lit. 154, 289. There may, it is true, be special cases, requiring special executions; but in ordinary cases, the right to have the usual execution follows every final judgment of course.

But it is said, the security by bond in these cases, takes the place of execution, and that the only remedy upon the judgment, is upon the bond. This by no means follows. We think the bond and security only intended as a resort, after an ineffectual attempt to obtain satisfaction by execution. This is analogous to our general policy to subject the security only in case of the inability of the principal debtor. Moreover, we think, the general practice has been to enforce these orders by execution, and feel no disposition to change it.

Judgment for the plaintiff.

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 LESSEE OF ANDERSON v. BROWN AND OTHERS.

A deed upon a sale on execution in 1799, might be executed by a sheriff's deputy, in the *name* of his principal.

An acknowledgment of such deed, made by a deputy after the death of his principal, is void.

EJECTMENT. From Athens. This case is submitted upon the following agreed facts: That Ebenezer Sproat was sheriff of Washington county in 1799, and John White his deputy: that a deed was made upon a sheriff's sale of the property which, after reciting the receipt of writ of *levari facias*, dated the 9th of April, 1799, his sale as deputy, proceeded: "I, John White, as well by the power and authority to me given, as in the consideration of, etc., to me paid, etc., do hereby in said capacity, grant, bargain and sell," etc., in fee, covenanting in his said capacity, that he was "lawfully authorized to execute the writ," had duly advertised and sold, and would "warrant, secure and defend the same against all people." Signed, John White, deputy sheriff. This deed was acknowledged before a justice, in June, 1799, and recorded in September, 1803. In 1836, after the death of Sproat, the sheriff, White appeared in the court of Common Pleas, and acknowledged the said deed, "in his said capacity as deputy sheriff,"

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Lessee of Anderson v. Brown and others.

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in open court. The only objection to the plaintiff's recovery, are raised to the sheriff's deed.

J. T. BRAZER, for the defendants, insisted: 1. That the sheriff had no power to appoint a deputy, as no statute conferred such [152] authority \*until 1817 or 1818. The common law right did not prevail in the north western territory at that time. 2. The deed was executed long after the expiration of the sheriff's term of office, and after his death; and the deputy's power ceased with that of the principal, unless continued by express statute. Wat. of Shff. 7 Law Lib. 24; 18 Johns. 122: 4 Ohio, 88. And 3. The deed is void, because not executed in the name of Sproat, the sheriff. All the acts of a deputy must be done in the name of the sheriff. 7 Law Lib. 23.

J. WELCH, for plaintiff. It is a sufficient reply to the first objection to refer to Haines v. Linsey, 4 Ohio, 88. The sheriff and deputy are mere ministerial public officers. The rule between principal and agent does not apply, because the law disposes of the property of the defendant in execution; neither the sheriff nor deputy have any interest. The only act done by the deputy after the death of the sheriff, was to *acknowledge* the deed. This is merely furnishing evidence of what he had before done.

By the Court, LANE, C. J. The first objection to the deed is that the sheriff in 1799, could not lawfully appoint a deputy to make a deed in any form. The power of the sheriff at common law, and without any authority from the statutes, to execute all ministerial duties by deputy, and particularly the power of making sales and deeds, is fully established by a former judgment of this court. 4 Ohio, 88. The second objection is that the deed was made in the name of White, the deputy, and not in the name of the sheriff. We think this objection sufficient. Where delegated authority is exercised, it must be exercised in the name of the principal. Where one acts as the attorney of another, the act should purport to be the act of the constituent. The deputies of a sheriff compose but one officer, and they have no authority except that exercised in the name of the principal. If, then, as in this case, a deputy assume to convey lands himself in his own name, his acts are void, like those of any other agent. 3. The acknowledgment of the deed was void likewise, for it was not until 1836, after the death of the principal. As the act of the agent acquires validity, because it is the act of the constituent, his power

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Hombeck v. Vanmetre.

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ceases when the capacity of the principal ends. We unite, therefore, in holding the deed void upon both grounds.

Judgment for the defendants.

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## SIMON HOMBECK v. DANIEL VANMETRE.

[153]

Where the vendor in a bill of sale or mortgage of goods retains the possession, that circumstance is *prima facie* evidence of fraud, but is not fraud *per se*.

In such case, the question of actual fraud is one to be left to the jury.

**REPLEVIN.** From Pickaway. The plaintiff, in support of his title, gave in evidence a bill of sale or mortgage from one Richardson, to himself, including the property in dispute, and a note made by Richardson to Isaac Hombeck, and endorsed to the plaintiff, which remained unpaid, and proved that after the time mentioned in the bill of sale for it to become absolute, viz. in December, 1838, the property remained in the possession of Richardson until April, 1839, and that between those periods, he frequently applied to Richardson for payment, who promised to pay, or arrange the debt by giving personal security; and that the property continued in possession of the defendant, until replevied.

The defendant's title consisted in a sale to him by Richardson, in April, 1839, for the consideration of seventy-five dollars; and proof that before his purchase, some of the other property included in the bill of sale had been advertised and sold on execution, as the property of Richardson, but it did not appear that the plaintiff knew of it.

The court instructed the jury that Richardson's continuing in possession of the property after the execution of the bill of sale, and after the bill became absolute, was *prima facie* evidence of fraud, but if upon the whole evidence, they believed the transaction between the plaintiff and Richardson was fair, and without any intention to defraud Richardson's creditors, or others who might purchase of him, the plaintiff would be entitled to recover, notwithstanding Richardson's possession, as, if the transaction was shown to be fair, the *prima facie* fraud was done away. The jury found for the plaintiff, and the defendant now moves for a new trial, because the court misdirected the jury.

H. N. HEDGES, for plaintiff.

J. OLDS, for defendant.

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 Hombeck v. Van Metre.
 

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By the Court, GRIMKE, Judge. The rule governing cases of this kind, has been subject to the greatest fluctuations in the United States. The decisions in this state, have, perhaps, been more uniform than in any other. In Pennsylvania it has been held that on an absolute or 154] \*conditional sale of chattels, possession must follow and accompany the sale, or it is fraudulent in law, although there is no fraud in fact. 5 Serg. and R. 275; 1 Penn. 57. The same has been declared to be the law in New Jersey, Connecticut, and Vermont. On the other hand, it has been held in New York, that the retaining possession of the property, is only *prima facie* evidence of fraud. 5 Johns. 258; 8 Johns. 452. In a later case in that state, the court appeared disposed to establish a more severe and inflexible rule. They held that if the party executing the bill of sale, was permitted to remain in possession, whether the sale was absolute or conditional, it was fraudulent in law; but that decision was again entirely overruled, *Bissell v. Hopkins*, 3 Cow. 166, where it was again held, that possession was only *prima facie* evidence of fraud. This last doctrine has been declared to be the law in Massachusetts, New Hampshire, and North Carolina. 15 Mass. 244; 5 Pick. 59; 5 N. Hamp. 545; 2 Hayw. 126. In this state but one rule has been declared, which is, that the retaining possession of property after the execution of a bill of sale, whether absolute or conditional, is a question of fact for the jury. Unexplained, the retaining of possession after sale, would be held fraudulent, but such possession is not regarded as conclusive evidence of fraud in itself.

We do not see how the court could properly have charged the jury different, without taking the case from them altogether. The jury were instructed that the circumstance of possession being retained, was *prima facie* evidence of fraud, and it was left to them to determine whether there was *actual* fraud in the transaction. Our reports are full of cases declaring the same doctrine.

Motion overruled.

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LESSEE OF WILKINS' HEIRS v. HUSE AND SWINDLER.

Under the act of 30th of January, 1822, "providing for the remission of penalties, and for the sale of land for taxes," the sale will be valid, although the judgment under which it is made is informal and erroneous.

Where the amount of *costs* in the judgment is left blank, and afterwards taxed

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Lessee of Wilkin's heirs v. Huse and Swindler.

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by the clerk, and included in the order of sale, that, if incorrect, will not invalidate the sale.

**EJECTMENT.** From Licking. Upon trial to the jury, it was admitted that the plaintiff's evidence made out a sufficient title in his lessors; and the only questions raised were upon the defendant's [155] title, depending upon the validity of a deed from the auditor of Licking county to William Wilson, on a sale for taxes, under the act for the remission of penalties and for the sale of land for taxes, passed the 30th Jan. 1822. To sustain their title the defendants offered the following evidence.

1. An entry in the journal of the court of Common Pleas of Licking, of December term, 1823, viz. "Stephen M'Dougal, county auditor for the county of Licking, appeared in court in pursuance of an act entitled 'an act providing for the remission of penalties and for the sale of land for taxes,' and moves the court for judgment in the name of the state of Ohio, against John S. Barnes, for the sum of thirteen dollars seventy-nine cents and three mills, due from the year 1810 to the year 1823 inclusive, on fifty acres of land, situate," &c. The minutes then show a great number of similar entries against other persons; and amongst others the following, under which the defendants claim: "Against John Wilkins for the sum of six hundred and twelve dollars seventy-one cents, being the tax, interest and penalty due on nineteen hundred and fifty acres of land, being all the north half of S. 2, T. 2, in R. 11, except fifty acres situate in the northwest corner of said section." Then follow several other similar motions against others, and the entries close in the following words. "being the persons in whose names said tax, interest and penalties are charged, and the said Stephen M'Dougal having produced to the court legal and satisfactory proof, and filed the same of record, that the notice required by the statute aforesaid has been duly given in the Wanderer, a newspaper printed in said county of Licking and having general circulation therein, and also that the requisitions of the statute aforesaid have in all things been complied with; and the several persons aforesaid having been severally three times solemnly called to come into court and show cause, if any they have or can show, why judgment should not be rendered against them for the tax, interest and penalties aforesaid, came not, but made default. Thereupon it is considered by the court that judgment be rendered, and judgment accordingly is rendered against the said several persons aforesaid for the tax, interest, and penalties

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so by them respectively due and owing as aforesaid, together with cost taxed at \_\_\_\_\_; and it is ordered by the court, that the auditor of the county of Licking aforesaid, proceed to sell the aforesaid several tracts of land, or so much thereof as will satisfy the several judgments aforesaid, in pursuance of the statute aforesaid."

156] \*2. Certified lists, purporting to be a list of the judgments, made out by the clerk of the court, under seal, and certified as follows: "I, Amos H. Coffee, clerk of the court of Common Pleas of the county of Licking, in the state of Ohio, do certify that the foregoing is an accurate list of the judgments rendered by said court, at their December term, A. D. 1823, in pursuance of "an act entitled an act for the remission of penalties and for the sale of land for taxes." And I do also further certify that it was ordered by said court, that the county auditor for the county aforesaid, should proceed to sell the aforesaid several tracts of land, or so much of them respectively, as should be sufficient to satisfy the aforesaid judgments, in pursuance of the provisions of the statute aforesaid. In testimony, &c. Amos H. Coffee, clerk." The list contains ninety-three cases, numbered consecutively, and containing, 1. The name of the delinquent. 2. The number of acres and description, range, township, section, lot, or quarter. 3. The year for which the tax was due. 4. Amount. 5. Costs. 6. Remarks. At number eighty-two on said list, is the following, under the head or caption which is common to all on the list:—

State Ohio against	Acres.	R.	T.	L.	Y. due.	Amount.	costs.	Remarks.
John Wilkins.	1950	11	2		1815 to 1823	612 71	1 75	This tract is the whole of north half except 50 acres taken out of N. W corner.

3. The original lists of sales made by the county auditor, with the following certificate at the foot of it. "To the honorable court of Common Pleas of Licking, now sitting: I, Stephen M'Dougal, auditor for said county, do hereby certify that the foregoing is a correct list of all the sales made by me on the 1st, 2d, and 3d days of June, 1824, to satisfy the several judgments entered in the court of Common Pleas for said county, against the proprietors of the several tracts of land described in said list, together with the purchasers' names, and the quantity sold, and description of the part sold, and that I have in every respect complied with the several acts of the legislature of the state of Ohio on that subject, in making the aforesaid sales, and herewith present my records for the inspection of the court, that the legal-

## Lessee of Wilkins' heirs v. Huse and Swindler.

ity of said sales may be enquired into." "Stephen M'Dougal." The list contains thirty-five acres, described as follows :

Proprietors.	Acres and rates.			Lot or Q.	R.	T.	S.	Years due	Amount of taxes & cost.			What part taken from	No. acres sold.	To whom sold.
	1st	2d	3d						D.	cts.	...			
Wilkins John		1960			11	2	2	1815 to 1823	614	46		This is the whole of the north section, except 50 acres taken from the N. W. corner.	1950	Wm. Wilson.

\*4. An entry on the Common Pleas journal of June term, 1824, [157 as follows: "On motion of Stephen M'Dougal, auditor of the county of Licking, and it appearing to the satisfaction of the court, that a list of the sales for taxes made by said auditor, previous to this term of this court, has been duly filed in the clerk's office of this court, and plats and surveys of the county surveyor, of the following tracts of land so sold by said auditor, made as the law directs, and duly filed with the clerk thereof, to wit: Six hundred and seventy acres in the 13th range," etc. The entry, after stating that a number of tracts of land were sold, and amongst them the following, the tract claimed by defendants: "One thousand nine hundred and fifty acres of land, in range 11, township and section 2, being the north half of said section, except fifty acres taken out of the north-west corner of said section, charged in the name of John Wilkins, and sold to William Wilson." After several other sales are described the entry closes as follows: "And on examination, the court being satisfied that the sales aforesaid have been made according to the provisions of the 'act providing for the remission of penalties and the sale of lands for taxes,' it is ordered by the court, that the auditor aforesaid, make to the purchaser or purchasers respectively, deeds for the said several tracts, in pursuance of the act aforesaid, agreeably to the surveys thereof."

5. A deed from M'Dougal, auditor, to Wm. Wilson, the purchaser of tract sold in the name of John Wilkins.

This closed the evidence. The court instructed the jury it was insufficient to sustain the defence. The plaintiff took a verdict; and the defendant now moves for a new trial.

P. WILCOX, H. STANBERRY, and SMYTHE, for plaintiff.

W. and J. R. STANBERRY, for defendants.

By the Court, HITCHCOCK, Judge. The law under which the premises in controversy were sold, is the act of June 30, 1822, entitled



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"an act for the remission of penalties and for the sale of lands for taxes," 2 Ch. St. 1216. This statute authorized the sale of such lands only as had been taxed prior to 1820, and the taxes remained unpaid. From 1815, up to 1820, there had been no sale of land for taxes, but such sales had been from time to time suspended. In the mean time, taxes, penalties, and interest had been accumulating, where the same were not paid, and necessity seemed to require of the general assembly, some special legislation upon the subject. In 1820, a very [158] \*material change was made in the system of taxation, but the law then enacted made no ample provision, as to the disposition of taxes which had been previously assessed upon land, and remained unpaid. Consequently the act of January 20, 1822, was passed. The first section prescribes "that all taxes, interest, and penalties which have accrued, and became due upon lands, and remain unpaid, prior to the year 1820, shall be collected in the manner hereinafter prescribed."

In the second section it is provided that if the arrearages of such taxes, together with the interest, shall be paid previous to the 10th day of December then next, in such case all penalties which accrued previous to 1820, shall be remitted.

In the fifth section it is made the duty of the county auditor, after having given notice as required in the section, "to appear at the court of Common Pleas of his proper county, according to the terms of said notice, and demand a judgment, in all cases where he shall be satisfied that such taxes, penalties, and interest may have been correctly and legally charged, and still remain unpaid." This judgment is to be demanded in the name of the state of Ohio. Any person or persons interested are authorized to appear and contest the claim, and provision is made that there may be a trial by jury. But "if no person appears to contest the claim of the state as aforesaid, it shall be the duty of said court, on motion, to render judgment for the amount appearing to be due, with costs that may have accrued, which shall be recorded by the clerk of said court, from which judgment *there shall be no appeal or writ of error to a superior court.*"

By the sixth section it is made the duty of the clerk of the court, to "make out a list of such judgment or judgments under the seal of said court, with an order of court for the sale of such lands, to satisfy such judgment or judgments, and deliver the same to said auditor, who shall proceed to sell the lands charged with said judgments," in the manner subsequently pointed out in the law.

After having received the list, the auditor, having given notice of

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the time and place of sale, by advertisement in a newspaper having general circulation in the county where the lands lie, for thirty days, is required to sell the lands or so much thereof as may be necessary, to such person or persons as will pay the judgment and costs, for the least number of acres.

Having made sale, it is required of the auditor that he return a list of such sales, "and if on examination said court shall be satisfied \* that the sales have been made according to the provisions of [159] this act, they shall order the auditor to make a deed to the purchaser for the tract so sold," etc.; and in the ninth section it is declared, that "the said deed shall convey to the purchaser all the title, either in law or equity, which the owner had in the lands described in said deed, at any time after the taxes, interest, and penalty, or either, for which the same was sold, began to accrue, and shall be received in all courts in this state and elsewhere, as *prima facie* evidence of good title to the lands therein mentioned, nor shall the title conveyed by such deed be invalidated or affected by the reversal of such judgment, or any error therein, or by any error in any proceedings previous to the rendition of such judgment, relating to the charging or collecting of taxes on such land, or the obtaining of such judgment."

It may be thought that the provisions of this law are somewhat severe, and we have been warned by counsel of the necessity of giving it a rigid and strict construction. In giving it a construction, I apprehend, however, that we must be governed by the ordinary rules in such cases. Because it is penal in some of its provisions, we can not therefore distort its evident meaning, and thus defeat the intention of the legislature. It must be recollected that this law was not intended to operate upon those who had punctually contributed to the support of the government, but upon those who had pertinaciously withheld such contributions—upon those who had long neglected and refused to pay the taxes levied upon their lands for the general welfare. And it ought, too, to be recollected, that previous and up to the time of the passage of this law, an opinion was prevalent that a sale of lands for taxes could not be sustained in this state, an opinion which had gained much strength in consequence of the decisions of our courts upon the subject. The prevalence of this opinion was well known to the members of the general assembly, and there can be no doubt, that this fact had much influence in the enactment of the law. This was one of the great evils intended to be remedied.

It is true that in carrying out the provisions of this law, individuals

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may be deprived of their lands without receiving an adequate compensation. But to avoid this evil, if an evil, under the circumstances, it may be called, it would be highly improper for this court to disregard those provisions. The legislature having said that from a judgment of the court of Common Pleas under this act, "there shall be no appeal or writ of error to any superior court," it is beyond the power of this court to sustain an appeal or writ of error. And the same legislature [160] having prescribed that the title conveyed by the auditor's deed shall not "be invalidated or affected by the reversal of such judgment or any error therein, or by any error in any proceedings previous to the rendition of any such judgment, relating to the charging or collecting of taxes on such lands, or the obtaining of such judgment," it is our duty to give effect to this requisition.

In giving the judgment this effect, however, no new principle is introduced. It is in substantial accordance with the effect given to a judgment rendered according to the ordinary course of the common law. The reversal of such judgment will not defeat the title of a purchaser under execution, which title accrued previous to the reversal. And the judgment itself can not, so long as it remains in force, be impeached collaterally, unless it be absolutely void. But it must be remembered, that a judgment rendered by a court not having jurisdiction of the subject matter, is absolutely void; and under such judgment no title can be acquired. This principle will apply as well to judgments under this statute, as to those rendered in other cases.

In order to sustain the title of a purchaser under this statute, it is necessary in the first place that there should be a judgment, rendered by a court having jurisdiction of the case. If there be such a judgment, the court enquiring into the validity of the title, are precluded from going behind it. In its effects it is conclusive upon the rights of all concerned. No informality, no irregularity, no error can vitiate it.

No "error in any proceedings previous" to its rendition, "relating to the charging or collecting of taxes on such lands, or the obtaining of any such judgment," can defeat the title acquired under it.

In the second place, it is necessary that there should have been a list of judgments certified by the clerk of the court in which the judgments were rendered, under the seal of the court, directed to the auditor of the county, with an order from the court to sell the lands therein specified in satisfaction of the judgments; which list vests as much power in the county auditor to sell, as would a *levari facias* in

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the sheriff of the county, with this difference, however, that the sheriff can not sell without appraisement, while the auditor can.

In the third place, it is necessary that there should have been a sale, in pursuance of notice previously given, as required in the law, and a return of this sale to the court by which it was ordered, for its examination and confirmation.

In the fourth place, there must have been a confirmation and approval of this sale by the court, and an order entered, that a deed be executed to the purchaser.

\*And in the fifth place, this deed must have been executed. [161

The first question for determination, then, in the case under consideration, is, whether there was a judgment.

The evidence introduced on the trial shows, that at the December term of the court of Common Pleas, 1823, the auditor appeared and moved the court for judgment in the name of the state of Ohio, against John Wilkins, for the sum of six hundred and twelve dollars and seventy-one cents, being the tax, interest, and penalty, on one thousand nine hundred and fifty acres of land, being all the north half of section two, township two, range eleven, except fifty acres, situate in the north west corner of said section. At the same time, and in the same motion was included an application for similar judgments against ninety-two other individuals, for the taxes, penalties, and interest due on as many separate and distinct tracts of land. The auditor at the same time proved to the court, that the notice required by law had been given, and the persons against whom the motion was made, were three times severally called, and defaulted. "Thereupon it is considered by the court, that judgment be rendered, and judgment accordingly is rendered against the said several persons aforesaid, for the tax, interest, and penalties, so by them respectively due, and owing as aforesaid, together with costs taxed at \$ . ." And it was further ordered by the court, that the auditor proceed to sell the aforesaid several tracts of land, or so much thereof, as will satisfy the several judgments aforesaid, in pursuance of the statute.

Here is a judgment and order of sale. The judgment is informal and perhaps erroneous, but is it void? There is no controversy but that the court had jurisdiction of the subject matter, and that legal notice that application for judgment would be made, had been given. It is a judgment in favor of the state of Ohio, against the individuals named in the record, or rather there are separate judgments in favor of the state of Ohio, against those individuals respectively. Several

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objections are made to its validity, however, which it is proper to consider.

It is objected that it is not rendered for any specific sum. The sum due for taxes, interest, and penalties, from Wilkins, is specified in the motion, and for the sums so due and owing, the judgment is rendered. Taking the whole record together, there can be no mistake as to the amount. It is as certain as it would have been, had that amount been specified in the judgment itself. It is the same in effect as would be the judgment upon a verdict of a jury assessing 162] \*damages, that the plaintiff recover the damages so assessed, without repeating the amount in the formal part of the judgment itself. The verdict and the judgment taken together, show the amount recovered.

Again it is objected, that this is not a judgment against Wilkins alone, but a joint judgment against him and several others. That there is some informality in this respect is apparent. It would have been better, had the record shown a separate motion and judgment in each particular case. But there is not a joint judgment against several individuals. The record shows that the motion made was for judgments against several individuals, for the sums from them respectively due, and that judgments were rendered accordingly. There were separate judgments against the separate delinquents.

Again it is objected, that the amount of costs is not specified in the judgment, but left in blank. If this be a defect, which we are by no means prepared to admit, it is at most but an error, and as before shown, errors do not vitiate.

After a careful examination, we have come to the conclusion, that here was a judgment within the meaning and intent of the statute, and such a judgment as is sufficient to protect the title of a purchaser under it.

The second enquiry is, whether a list of judgments was made out and certified under the seal of the court, by the clerk, and delivered to the auditor, directing him to sell, &c. Upon this point there is no controversy. Such list was made out, and in that list, the judgment against Wilkins is stated to be for taxes, interest, and penalties, amounting to six hundred and twelve dollars and seventy-one cents, and costs taxed at one dollar and seventy five cents.

The next enquiry is, whether the land was sold in pursuance of notice given according to law, and was a return of this sale made to the court of Common Pleas for confirmation. That the land was sold,

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and a return of the sale made, is not controverted. And the court, whose duty it was to examine the whole matter say, they are "satisfied that the sales had been made according to the provisions of the act," under which they were made. And this is sufficient to satisfy this court that notice must have been given.

It is objected to the sale, however, that the sum charged upon the land, and for which it was sold, was six hundred and fourteen dollars and forty-six cents, whereas the judgment rendered was only for six hundred and twelve dollars and seventy-one cents. The judgment was for the tax, interest, and penalty, amounting to six hundred and twelve dollars and seventy-one cents, together with costs taxed at \*\$ [163] In the order of sale, the costs are included, taxed at one dollar and seventy five cents, making the whole six hundred and fourteen dollars and seventy-six cents, and for this the land was sold. It is said that the clerk had no right to tax these costs, and thus include them in the order. We are not prepared to assent to this position of counsel. As a matter of fact, we know that judgments are ordinarily entered in this way, and the costs are subsequently taxed by the clerks and included in executions. Admitting the practice to have been originally incorrect, it has prevailed too long to be now interfered with. But by our system it seems to be the duty of the clerk to tax all cost, and for this he is entitled by the statute to receive a compensation. It would seem, too, that this is to be done after judgment, as the statute provides, "that for drawing cost bill, *after final judgment or decree*," the clerk shall receive thirty five cents. 29 O. L. 222. Let this be as it may, however, so long as it does not appear that the costs exceed the amount, which ought to be included in the judgment, we do not feel disposed to declare a sale void on this account.

The fourth enquiry is, whether the sale made by the auditor was approved and confirmed by the court, and a deed ordered to be made to the purchaser. That the sale was thus approved and confirmed, and a deed ordered to be made to the purchaser in pursuance thereof, is apparent from the evidence in the case, and it is equally clear that a deed was made in pursuance of the order of court.

Upon the whole, we are satisfied that the court mistook the law in the instructions given to the jury, and a new trial must be awarded, the costs to abide the event of the suit.

New trial awarded.

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Lessee of Barger v. Jackson.

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**LESSEE OF JOHN AND JACOB BARGER v. JAMES AND DAVID JACKSON.**

Where a tract of land is divided by a county line, leaving part in each county, each portion should, under the act of 30th Jan. 1822, be listed for taxation in the county where it lies.

A judgment against the whole tract is void, and the sale, confirmation, and deed, under such void judgment, of no validity.

**EJECTMENT.** From Pike. Upon trial a verdict was taken for the plaintiff, subject to the opinion of the court. The plaintiff claims two hundred acres of land to which his lessors claim title through a 164] deed \*from the auditor of Pike, under a sale for taxes, on a judgment rendered in 1823, under the act entitled "an act providing for the remission of penalties, and for the sale of lands for taxes," passed January 30, 1822. This tract was divided by the county line, between Pike and Highland. The agreed facts seek a construction of a part of that law, and will be sufficiently detailed in the opinion of the court.

R. DOUGLASS and B. G. LEONARD, for plaintiff.

T. SCOTT and SON, and H. MASSIE, for defendants.

By the Court, WOOD, Judge. The 3d section of the act of the 30th of January, 1822, 2 Ch. St. 1216, provides, that the state auditor shall, on or before the 1st of May, 1822, transmit to the county auditors a list of the land within *respective counties*, on which arrearages of taxes were charged previous to 1820, and which remained unpaid, with a statement of corrections. This the county auditor is required to compare with the duplicates in his office, correct, and advertise a corrected list of the delinquent lands, and certify to the state auditor his corrections, from which duplicates were required to be made out and forwarded to the county auditor. The fifth section requires the county auditor to advertise the list so received, six weeks, in a newspaper of general circulation *in the county where the land lies*, of his intention to move the next court of Common Pleas for judgment, for the amount of the tax, interest and penalty, against the person charged with the tax, and at the court to appear and demand judgment. The 6th section requires the clerk to certify a list of said judgments under seal to the auditor. The 7th section requires the auditor to advertise in the county where the land lies, and proceed to sell.

In the case before us we need look only to the plaintiff's title, for he must recover on the strength of that, if at all. He must show the

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provisions of the act of 1822, substantially complied with, for, after the repeated decisions of this court, I need hardly add, that a tax title is regarded *stricti juris*. The county line severs the tract in dispute, leaving part in Pike, and part in Highland county. The judgment was taken in Pike, against the whole tract, and the whole was advertised, sold and conveyed in that county. The question is, can this sale be sustained? The statute seems to us to make each county a *separate district for the collection of taxes*. The duplicate is transmitted to the auditor of the county where the land lies, who is to advertise in a paper in that county, take judgment, make sale, and obtain a confirmation there. All the proceedings are required to be in the \*county [165 of the land. It seems to us very clear, that any proceeding in relation to the land and tax in any other than the county where it is situated, is void. The judgment in Pike against land in Highland county is itself a nullity, and embracing a subject, the land in Highland, not within the jurisdiction of the court. Being void for part, it is so for the whole, for a judgment is an *entire thing*. The charge upon the duplicate, the foundation of the judgment, the notice, sale, and deed, are all illegal and of no effect as founded upon a void judgment. The plaintiff then is not entitled to recover

Nonsuit ordered.

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JOSEPH C. BINGHAM v. DAVID C. DOANE:

AND

WILLIAM N. MUMFORD v. DAVID C. DOANE.

The grant of a privilege to construct a wharf or dock in a public highway, does not authorize the erection of a warehouse.

Where the proprietor of lands adjoining a public highway, owns to its centre, he may maintain trespass for a direct injury upon it; but where his land extends only to the line of the highway, case is his only remedy.

THE first suit is case, and the second trespass. From Wood. The cases depend upon the same title, and the two suits are brought to avoid the risk of defeat, by the form of action.

By the treaty of Brownstown, in 1808, Swan's Land Law, 484, the Indians, then possessing the lands in the north western part of our state, granted to the United States a tract of land, for a road one hundred and twenty feet wide, from the Maumee Rapids, to the Con-



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necticut Western Reserve, and all the land within a mile of said road on each side, for the purpose of establishing settlements. In 1823, Congress, to enable the state to construct this road, granted to the state a tract of land one hundred and twenty feet wide, whereon to locate it, and likewise the land lying a mile wide upon each side. Swan's L. L. 152.

The road was surveyed and laid out, and a superintendent appointed to effect its construction, under the authority of the state. The line of its projection, commenced at the western line of the Connecticut Reserve, and extended to the shore of the Maumee River at Perrysburgh. By the Ohio act of 1824, 22 O. L. L. 128, the superintendent **166**] was authorized to enter into contracts for making \* the road, and likewise to sell the land adjoining thereto, upon certain specified conditions. By the act of 1824, the 23 O. L. 33, the superintendent was further directed to make surveys and sales of lands belonging to the state in the reservation at the Maumee Rapids. By the 4th section of that act he was "authorized to convey to such persons as he should deem proper, the privilege of constructing docks and wharves at the point where the road terminates at the Maumee River, to be constructed on each side of the road, in such manner as that said road shall in no respect be incommoded in consequence." On the 17th of March, 1825, the superintendent by deed conveyed to Seth Doane, the privilege of constructing docks and wharves at the point of termination, within the one hundred and twenty feet wide, leaving thirty-three feet in the centre unobstructed. This privilege is now held by the defendant.

On the 1st of January, 1827, the state conveyed to John Hollister, lot 774, which lies on the Maumee River, adjoining the one hundred and twenty feet set apart for the road. He had full knowledge of Doane's interests, at the time he took this deed. Bingham, one of the plaintiffs, held Hollister's interest in this lot from 2nd February, 1836, until the 1st June, 1836; when Mumford, the other plaintiff, acquired Bingham's title. In November, 1835, the defendant, Doane, began the erection of a warehouse upon that portion of the strip of one hundred and twenty feet wide, which lies outside of the thirty-three feet in the centre.

Bingham brings the action on the case against him, counting upon the erection of the warehouse in 1834, in the street in front of his lot. Mumford brings trespass for the erection of the warehouse, and for his continuance since. The cases are submitted upon agreed facts.

STETSON, and W. SILLIMAN, for plaintiffs, made two points. 1.

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That Ohio had no authority to permit obstructions to a road by buildings within its limits. 2. That she has not authorized such obstruction. They cite the several statutes, and 5 Ohio, 410; 6 Ohio, 298.

J. C. SPINK, and COFFINBURY, for the defendant, insisted that neither of these suits could be maintained, even if the defendant's grant was imperfect. 8 Ohio, 38; 6 Ohio, 298. The plaintiff having neither title nor possession, can not maintain trespass. The state having parted with its title to Doane, had none to convey to Hollister, and she did not convey to him any riparian rights. 15 Johns. 454; 5 Wheat. 374. As to the action on the case, the grant to Ohio was full to lay out and open the road, without restriction \*as to any [167 proper structure for its improvement and preservation. The grant to Doane does not impair this nor impugn the ordinance of 1787, or the decision in 5 Ohio, 140; See also Dane's Ab. 149; 1 Co. Lit. 121, b.

By the Court, LANE, C. J. The important question in this case is, whether Doane acquired a right to erect a warehouse, within the one hundred and twenty feet wide, granted for the road? It is plain that all the laws and documents point to, and recognize this as set apart "for a road." The act of Congress conveys it to the state of Ohio, as a tract whereon "to locate a road." The act of Ohio directs the commissioners to locate and survey said road one hundred and twenty feet "wide," between the terminating points. Under these circumstances, we shall look for some strongly decisive act of the state, before we admit their intention to devote it to any other use. We find none. The superintendent was appointed in 1824, to contract for the construction of the road, and to make sales of the adjoining lands. The next year, his discretion is enlarged as to the forms of survey of the lands belonging to the state within the reservations, but no intention is expressed, and no power is given, to affect the line of the road, or contract the rights of the public to it as a public highway. The privilege of docking and wharfing, are in no degree inconsistent, but in furtherance of the object. The point of termination is a navigable river. A wharf is the extension of the road into the river. A dock is a place for vessels, either excavated from the land, or surrounded by wharves. Both, in this situation, are subservient to the public, by facilitating the transit of passengers and burthens between the land and the water, and thus both contribute to the object sought for, by the establishment of the highway. When placed in public highways, although individuals may have interests in them, they are intrinsically

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public establishments, and a part of the highway, as much as turnpikes and toll bridges, and held under the control of public regulation or of law. But a warehouse has none of these properties. Although convenient for public accommodation, it is held by an individual for his private benefit only. It is not a part of a pier; it is not devoted to a public use; it aids not, but obstructs the right of passage. It is, therefore, expressly forbidden by the law, directing the wharf or dock to be so constructed, that the road shall in no respects be incommoded in consequence.

We next enquire, if the plaintiffs have such rights as to recover in these forms of action? It is admitted that for an injury merely to **168]** \*the public, no individual can support an action. But the owner of a lot adjoining a road has a specific interest in the privilege of the road itself. Ordinarily his land extends to its centre, as it is presumed to be taken from his land; and in those cases, where he does own the soil of the road, he has an interest in the incorporeal right itself. Its existence generally contributes to the enjoyment of his lot, and confers additional value upon it, and any act of another, which impairs that value or interferes with that enjoyment, may be the subject of a suit. To sustain an action of trespass, the plaintiff must have a present interest in possession in the lands. Where all highways run over land of another, the creation of the easement does not extinguish all the interest of the owner; he still claims all not incompatible with the right of passing. For direct trespasses, as for the cutting of shade trees, or the taking of stone or gravel, he may sue. The owner of the adjoining land is presumed to own the highway, because it is presumed the land was taken from him; he is, therefore, permitted to recover for injuries like those in trespass. But where the title exhibited is such, as shows the owner of the adjoining land had no title to the land covered by the road, as is the case before us, he has no interest which is the subject of trespass. The easement—the privilege of the road—the advantage it confers on his land, is his, but not the road itself. The right lies not in livery but in grant; is incorporeal only, and not the subject of this form of action. The suit, therefore, of *Mumford v. Doane*, is misconceived, and judgment must be entered for the defendant. The action on the case is not subject to this objection. It is adapted to recover for the injury sustained by Bingham, during the few months in which he held the property. This case will be remanded to try his right.

Judgment against Mumford—the other case remanded.

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Lessee of Livingston v. McDonald.

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## LESSEE OF JOHN LIVINGSTON v. WILLIAM McDONALD.

Where an officer taking an acknowledgment of deed, describes himself as an officer whom the law authorizes to take it, he need not state the fact in his certificate, that he was so authorized.

A recorder's copy of a deed, thereon which is a certificate of an associate judge in Pennsylvania, of proof having been made before him of its execution, in August, 1800, is competent evidence, under the act of 1831.

**EJECTMENT.** From Butler. Upon trial before the jury, the plaintiff, amongst other evidence, offered a certified copy of a deed from \*John Cleve Symmes to James Henry, dated the 10th of July, [169 1797, and attested by three witnesses. The deed was proven by one of the subscribing witnesses on the 8th of August, 1800, before Reynold Keen, who certifies that he is one of the associate judges of the court of Common Pleas of the city and county of Philadelphia. It was recorded in Hamilton county the 28th of August, 1800, while Butler constituted a part of that county. This deed was overruled by the court and a verdict taken for the defendant. The plaintiff now moves for a new trial because the deed was improperly rejected.

MILLIKEN, BEBB, and G. J. SMITH, for the plaintiff. The deed was rejected because the official character of Keen was not sufficiently shown. The deed was proven in Pennsylvania according to the laws of that state then in force; and the judge's certificate of his official character, is *prima facie* evidence of it. Read's Dig. 89; 1 Ch. St. 168; 2 Ohio, 56; This deed having been recorded under the act of 20th of Jan. 1802, was, by that act, made valid. 1 Ch. St. 342, 3; 1 Kent. C. 456.

J. Woods, contra, submitted no argument.

By the court, GRIMKE, Judge. The 8th section of the act establishing a recorder's office, passed the 18th of June, 1795, declares that deeds shall be acknowledged by one of the grantors, or proved by one or more of the subscribing witnesses before one of the judges of the general court, or one of the justices of the court of Common Pleas of the county where the land lies. And the act of the 20th of Jan. 1802, gives effect to all deeds which had been acknowledged or proved according to the laws of the state where the acknowledgment or proof was taken. This deed was acknowledged according to the laws of Pennsylvania; and, indeed, the law of June, 1795, under which the

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*Lessee of heirs of Thompson v. Gotham.*

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deed was executed, was itself adopted from the Pennsylvania code. The ground of rejecting the deed, was simply that it did not appear from the certificate of the judge that he was an officer authorized to take the acknowledgment or proof. In *Lessee of Johnston v. Haines*, 2 Ohio, 55, it was decided, that where the person taking the acknowledgment of a deed, gives himself no official character in his certificate or subscription, the certificate is insufficient, and the registry of the deed irregular. In that case it was not expressed in the acknowledgment, that the person taking it was an officer of any kind, and the [170] name subscribed was without any official character. But in the present instance it does appear from the certificate, that the person taking proof of execution, was one of the associate judges of the county and city of Philadelphia. It was not necessary that the judge should say, in so many words, that he was authorized to take proof, when he stated a fact from which that inference is irresistibly made. He states his official character, and the laws of Pennsylvania gave a person invested with that official character authority to take the acknowledgment or proof. No objection was taken to the deed in consequence of its being a copy from the recorder's office, nor could such objection be sustained, as the statute of 1831, makes such copies evidence. The deed, therefore, was improperly rejected, and a new trial must be awarded.

New trial granted.

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**LESSEE OF THE HEIRS OF JAMES THOMPSON v. JOHN GOTHAM.**

Under the grant by Connecticut, to the sufferers in the revolutionary war, where the original sufferer was dead, the share for his losses passed to his heirs by purchase, not by descent.

To sustain a collector's deed for land sold for taxes, proof must be given to show that notice and the other preliminary steps have been duly taken; the recital in the deed is not proof of such facts.

The statute of limitations does not affect claims to land until after the Indian title has been extinguished.

Partition of land held in common, will bind the owner of an interest although other persons may have represented his right in the partition proceedings.

*Quere.* If the territorial jurisdiction of Connecticut extended over the Western Reserve until her deed of cession in 1800

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**EJECTMENT** for a part of section 4, T. 6, R. 20. From Huron. Upon the trial, the plaintiffs proved themselves to be the heirs of James Thompson, late of the state of Connecticut, deceased, and claimed title to the land in controversy under a grant from that state, made on the 10th day of May, 1792. Thompson died in 1785, seven years before this grant was made.

The defendants then introduced copies of records from a court of probate in Connecticut, from which it appeared that Guy Richards was appointed administrator on the estate of Thompson, and that in 1797, he was authorized to sell the real estate of said Thompson. It further appeared from the return of sales by the said Richards, that the interest of Thompson in the fire lands, so called, estimated at two hundred and ninety-eight acres, was sold to Nathaniel Richards, \*on the 28th day of August, 1798. Two days after the sale, the [171 administrator conveyed his interest to Nathaniel Richards, and he re-conveyed the same to Guy Richards, the administrator, on the same day.

The defendant next gave in evidence an act of the general assembly of the state of Ohio, of the 15th April, 1803, incorporating the company commonly called the fire land company, by the name of "the proprietors of the half million acres of lands, lying south of lake Erie, called sufferer's land." And also the minutes and records of said company, proving the assessment of a tax of twenty-five cents on the pound, original loss, for the purposes named in the act of incorporation, the appointment of William Richards, collector of said tax, for New London, and the qualification of said Richards, as collector. In connection with this record, the defendant introduced a deed from William Richards, collector, to Guy Richards, bearing date the 25th of August, 1805, which purports to convey the interest therein described, as being the rights of the proprietors of that loss, which was set in the original grant to James Thompson, of three hundred and fifty pounds and seven pence. This deed recites the act of Ohio, incorporating the company, the assessment of the tax of twenty-five cents on the pound, the notice of such assessment, the default of payment, the order of the company for sale in default of payment, the sale to Guy Richards as the highest bidder, and that the deed was made in conformity to the order of the company, for the sale of the rights therein named.

In the partition of the fire lands, so called, this right was set to Richards in the section including the land in controversy.

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The defendant further gave in evidence a deed from Guy Richards for the premises, to Isaac Tillotson, dated October, 1809. A like deed from Tillotson to Asa Sandford, dated March, 1819. A like from Asa to Giles Sandford, dated July, 1819, and from Giles Sanford to the defendant, dated November, 1833

The defendant further proved that he and those under whom he claimed, had been in possession of the premises since 1809.

To rebut this last evidence, testimony was introduced by the plaintiff to show that his lessors had never been in the state of Ohio.

The court charged the jury that the grant of the state of Connecticut, being subsequent to the death of James Thompson, no title to the land ever vested in him; that it was a donation to his heirs, and not subject to the payment of his debts. That the sale by the administrator, was of the interest of James Thompson, in the land, and as 172] James Thompson had no interest, the grantee could take \*nothing by the administrator's deed. That the tax title was subject to the same infirmity, and that it was the duty of the jury to return a verdict for the plaintiff, which they did for eight acres. The defendant now moves for a new trial, because the court erred in declaring the administrator's and collector's deeds void.

BOALT and WORCESTER, for the motion, insisted that the court erred in holding that the administrator's deed did not convey title. That although the grant was made by the state of Connecticut after the death of James Thompson, and of course vested the title in his heirs, by its terms, yet as it was made to compensate a loss sustained by their ancestor, they must be holden as taking by descent, and not by purchase. And to this point they cited *Bond v. Swearingen*, 1 Ohio, 395. They further insisted, that at the time of the sale, the premises in controversy were within the jurisdictional limits of the state of Connecticut, and so continued until 1800, when that state authorized her governor to cede the jurisdiction of that state in the Western Reserve, to the United States, in pursuance of an act of Congress, which authorized the President to quit claim, for the use of persons holding under Connecticut, all the right, title and interest, to the soil of the Western Reserve. That the land being thus within the jurisdiction of Connecticut, her courts, in pursuance of her laws, might with propriety order its sale, and that sales made in pursuance of such order, would be good and valid, and convey title. To sustain these positions, they argued at great length and with much ability. They further insisted, that as the lands were within the jurisdiction

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of Connecticut, the statute of limitations of that state must be operative, and that by this statute the rights of the lessors of the plaintiff would be barred. They claimed that the sale for taxes was in pursuance of the law incorporating the fire land company, and of course by this sale a title was vested in Guy Richards, by the collector's deed.

HOPKINS, for the plaintiff, insisted that the heirs of Thompson took by purchase and not by descent; and claimed that this principle had been decided by this court in a number of cases in Huron county. Of these he referred to the Lessee of Garden and Huntington v. Wm. Winthrop, and Stephen Holt and wife v. John Miller. Admitting, then, the jurisdiction of the state of Connecticut, as claimed by the defendant's counsel, the purchaser from the administrator of Thompson could acquire no interest in these lands, because Thompson [173 himself had no interest. He insisted that Richards acquired no title under the sale for taxes, because there was no proof that legal notice had been given of the sale, or that the other requisitions of the law had been complied with, and cited 3 Ohio, 232; 5 Ohio, 368; 4 Wheat. 77; 9 Cr. 64.

By the Court, HITCHCOCK, Judge. In deciding this case, in the view we take of it, it will be unnecessary to determine whether the state of Connecticut had jurisdiction over the Connecticut Western Reserve, prior to the act of cession of 1800, or not. This question does not appear to have been agitated upon the circuit, but for the purposes of this case the jurisdiction seems to have been admitted.

The court charged the jury that the administrator's deed conveyed nothing to the grantee, because the intestate had no interest in the land.

Whether the opinion of the court thus expressed was in conformity with law, must depend upon the construction of the grant of the state of Connecticut. This grant was made by the legislature of that state, by resolution bearing date May 10th, 1792. Swan's L. Laws, 81. To its proper understanding it is necessary to take the preamble in connection with the resolution, and it may be useful to quote both the preamble and resolution. It is as follows: "Upon the memorial of the towns of Fairfield and Norwalk, showing to this assembly, that many of the inhabitants of said towns suffered great losses by the devastations of the enemy, during the late war, praying a compensation therefor; and in a report of a committee appointed by this assembly, at their sessions held at Hartford, in May, 1791, to ascertain from docu-



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ments in the public offices, the amount of the losses of the said memorialists, and others, under similar circumstances, which have been estimated conformably to acts of this legislature, being such as were occasioned by the incursions of the enemy during the late war, distinguishing the losses of buildings and necessary furniture, from those of other articles, by said documents or otherwise; and also, to ascertain the advancements which have been made to the sufferers, by abatement of taxes or otherwise; and report the same, with their opinion relative to the ways and means of affording further relief, as per memorial and report on file.

"Resolved by this assembly, that there hereby is, released and quit claimed to the sufferers hereafter named, or their legal representatives, where they are dead, and to their heirs and assigns forever, five hundred thousand acres of the lands belonging to this state, lying [174] \* west of the state of Pennsylvania, and bounding northerly on the shores of Lake Erie, beginning at the west line of said land, and extending eastward, to a line running northerly and southerly, parallel to the east line of said tract of land belonging to this state, and extending the whole width of said lands, and easterly so far as to make said quantity of five hundred thousand acres of land, exclusive of any lands within said bounds, if any be, which may have been heretofore granted, to be divided to and among said sufferers, and their legal representatives, where they are dead, in proportion to the several sums annexed to their names, as follows in the annexed list."

Then follows a list of names, with the amount of loss sustained by each. In this list, is the name of James Thompson, of New London, and the amount of loss annexed to his name is three hundred and fifty pounds and seven pence.

There can be no mistake as to the persons to whom this grant is made. It is the "sufferers" themselves, where they are living, or to "their legal representatives, where they are dead." At the time it was made, James Thompson had been dead some years, and the grant is as effectually to his heirs as if they had been specifically named therein. It is made to them, not as a matter of right, but as a donation to compensate for losses sustained by their father in the war of the revolution, from the common enemy. And in order to ascertain the extent of their interest in the land granted, reference must be had to the amount of the losses thus sustained.

It is not insisted by the defendant's counsel, but that the grant of these lands was in fact to the heirs of Thompson, but it is claimed

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that they took them by descent and not by purchase; and that consequently they were properly liable to the payment of the debts of the ancestor, from whom they descended, and could be sold for the payment of those debts. The case of the Lessee of Bond v. Swearingen, 1 Ohio, 395, is cited as an authority. That was a case relative to land within the Virginia military district, and it was decided by the court, that where lands have been located and surveyed by the ancestor, and subsequently patented to his heirs, the heirs took by descent. By an entry and survey, the lands are appropriated. And when such survey is made and recorded, every thing has been done that can be by the holder of the warrant, to secure to himself a legal title. He has a perfect equity, and has a claim, not upon the bounty, but upon the justice of the government, for a patent. And it is right and proper that if the patent is withheld during his life, and \*subse-[175]quently emanates to his heirs, they should be held as taking by descent. The same principle applies where lands are purchased from the government of the United States, and the purchase money is paid. In such case the purchaser can, as a matter of right, demand from the government a patent. By the purchase, the land is specifically appropriated, and whether patented or not, an interest in it will descend to the heirs of the purchaser, in case of his death.

But the case before the court is entirely different. James Thompson undoubtedly had a claim upon the liberality of the government of Connecticut, if not upon its justice. But how that claim should be satisfied, whether by money, by abatement of taxes, or otherwise, was not determined during his life. There was no specific appropriation of land for its satisfaction. Whether any satisfaction should be made, and in what way, does not appear to have been fully settled until the passage of the resolution, by which the grant was made, and that was long after his death. He never had any interest in these lands which could descend to his heirs. The grant then was a donation to those heirs; they took by purchase, and the land granted could not be disposed of to pay the debts of their ancestor. The deed, therefore, of the administrator of Thompson, did in fact convey nothing, because Thompson himself had no interest in the land.

The court next charged the jury that the deed from the collector of taxes was subject to the same infirmity with the deed from the administrator. Exception is taken to this part of the charge.

In saying that the collector's deed is subject to the same infirmity with the administrator's, I understand the court as meaning that it

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was equally defective to convey title. In order to sustain a title under a sale for taxes, it is not sufficient to produce the collector's deed. There must be evidence to show that the tax has been levied, that the steps required by law to authorize a sale have been taken, and that the person making the deed had authority to make it. It must be remembered that the tax for which the interest in this land was sold, was not a tax levied by the state of Ohio, but by a corporation created by the authority of the state of Ohio. Of course we can not resort to our public statutes to ascertain whether a tax was or was not levied. Nor can we resort to those statutes as pointing out the mode of collection. The law creating the corporation, is that which is to govern.

The evidence exhibited in this case to sustain the deed of the collector, was a copy of the records of the fire land company, showing that by an act of the company of the 9th of February, 1804, a tax of **176]** \*twenty-five cents on the pound of original loss, was assessed by the company, that William Richards was appointed a collector of the company, and that on the 10th of the same month, he was duly sworn to discharge the duties of his office. This evidence shows that a tax was assessed or levied, and we have no doubt that it was such a tax as the company had a right to assess or levy under its act of incorporation. In the 7th section of the act of incorporation, 1 Swan's L. L. 107, it is enacted, "that it shall be the duty of the collector or collectors, to execute all warrants to him or them directed by the treasurer, for collection of any tax or taxes laid by said board of directors. And said collector or collectors, shall give due and reasonable notice of the time when said tax or taxes are or shall be payable to the treasurer of said directors, by advertising the same at least three weeks successively, in at least one newspaper published in each of the counties of Fairfield, New Haven, and New London, in said state of Connecticut, and by giving any further notice in, or without said state of Connecticut, as said directors may order, and that said tax or taxes shall be assessed on the original rights or losses, in proportion to each person's respective share or loss, as set in said grant: Provided, That said lands only shall be subject to the payment of said tax or taxes; and that when any tax or taxes, after the time limited to the payment thereof, remains unpaid, it shall be the further duty of said collector or collectors, to give notice of time and place, in manner aforesaid, that he shall proceed to sell, at public vendue, so much of the original loss and right of such delinquent proprietor, as will be sufficient to pay said tax or taxes, and all reasonable charges arising

thereon; said notice to be at least sixty days previous to any sale being made by any collector." There was no proof before the court, except what is contained in the collector's deed, that any such notice as is required in this section was ever given. The recital in the deed is not sufficient proof of the fact. It should be proven by evidence extrinsic. To hold a sale for taxes valid, where there is this defect of proof, would be contravening the uniform decisions of this court upon the same subject matter. There being this defect of proof, the court decided correctly that the collector's deed was not operative to convey title.

It is argued in favor of the motion for a new trial, that as these lands were within the jurisdiction of the state of Connecticut at the time they were sold at administrator's sale, that the statute of limitations of that state, must, from the time of that sale, have commenced running in favor of the purchaser, and that by that statute the claim \*of the lessors of the plaintiff would be barred. It is a suffi- [177] cient answer to this position of the counsel to say, that the statute of limitation operates in favor of a person in possession; that the Indians were in possession of this land until the 4th day of July, 1805, when their title was extinguished by treaty, Swan's L. L. 482, and that there is no evidence in the case to show that the defendant or those under whom he claims, were ever in the actual possession until 1809.

Another objection to the verdict is, that it includes too much land. It is insisted by counsel, that if the heirs of James Thompson were not divested of their interest in the lands granted by the state of Connecticut, either by the deed made by the administrator of Thompson, or by the collector of taxes, they must take the same in common with all the proprietors, regardless of partitions, which have been made; and of course that in the lot of ground which is now in controversy, their proportion, instead of being eight acres, as found by the verdict, would be far less than one-fourth of an acre. This position assumed by counsel can not be sustained. In the second section of the act incorporating "the owners and proprietors of the half million acres of land, lying south of Lake Erie," Swan's L. L. 106, the management of the affairs of the company is committed to a board of directors, to consist of nine persons, and among other things to be done by said directors, it is made their duty to adopt and prosecute measures "to survey and locate the same," that is the lands, "into townships and otherwise, and to make an exact partition thereof, to and among the owners and proprietors thereof, and *their assigns*, in proportion to the

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amount of loss or losses by them respectively owned, at the time of making such partition, in such way and manner as said board of directors shall direct." In pursuance of this authority, the land was surveyed into townships and quarter townships or sections, the losses were classified, and partition made. In this partition a just proportion of land was set to each right or loss. The proceedings of the company were all recorded in books kept by their clerk, as well in the transaction of other business as in making partition. By an act of the general assembly of the 20th of February, 1812, Swan's L. L. 109, it is directed that these books of record be kept by the recorder of deeds of Huron county, that they "be and remain a part and parcel of the records of said county, and that any certified copies therefrom, which may hereafter be made by the recorder of said county, may be used and read as legal evidence, in all courts of record, or elsewhere."

In this partition, the loss set to James Thompson in the grant of 178] the \*state of Connecticut, was classified as belonging to Guy Richards, he claiming as "assignee" of this interest, in consequence of the purchase at administrator's and collector's sales, and the land in controversy was in part set off to him in satisfaction of this interest. The land having been granted to the heirs of Thompson, and the title still remaining in them, they may enforce their claim to it, either in his hands or in the hands of those who hold under him. In fact when we remember that this partition was made more than thirty years since; that it was just and fair; that lands have been sold and settled with reference to, and in conformity with it; it may be well doubted whether a court under any circumstances, could be justified in interfering with it.

New trial refused

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**PHILIP C. PENDLETON v. JAMES GALLOWAY AND OTHERS.**

A bill in equity to impeach a decree or judgment for fraud, must set forth the circumstances which constitute the fraud, particularly and precisely.

Such a bill will not be sustained after an acquiescence in the decree for twenty-five years.

**BILL IN CHANCERY.** From Greene. The complainants allege, among other things, that at the August term of the Supreme Court in 1835, they obtained a decree against one John Campbell, a non-resident,

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and Robert Bogges a resident of Greene county, for five thousand two hundred and fifty-eight dollars, ninety-four cents, with interest and costs, and also for the control of a judgment before recovered by said Campbell against said Bogges, for two thousand five hundred and three dollars, forty-five cents, in the Circuit court of the United States for the district of Ohio, to apply so much as might be made on the judgment, in part satisfaction of the decree. The complainant states that he has since ascertained that Bogges is wholly insolvent, so that nothing can be made of him; that Campbell never resided in Ohio, and has no known property in the state, except certain entries and surveys of Virginia military lands, in the name of Archibald Campbell, for about six thousand acres, part of Warrant No. 3001, issued to his father Richard Campbell, for military services; that John Campbell failed in Virginia before 1808, involving the complainant in a large amount, in part embraced in the aforesaid decree. That about 1808, John Campbell entered the army, was marched into the southwest and never returned, having, before he left, on the 8th of July, \*1808, executed a deed to the complainant and one Newkirk, conveying all his interest, as heir at law, in said surveys, and a claim against said Bogges, to indemnify him against his said liabilities: that in Feb. 1800, Richard Campbell, jr. another son and heir of Campbell, the warrant holder, conveyed these surveys to one John Baker, intended only as a mortgage to secure a debt due him, and Baker having willed all his lands to his son and two daughters, soon after died, and the heirs and devisees of Baker, in May, 1813, filed their bill in the Common Pleas of Greene county against John Campbell and others, setting forth this conveyance, but falsely and fraudulently representing it as the *bona fide* absolute deed of Richard, jr. who was duly authorized by the other heirs to make it; and that after it was received, it was sent to Hamilton county for record, but by accident was lost. They prayed in that bill to be quieted in their title to the surveys. The complainant alleges that John Campbell and others had no notice in fact of that suit, the service being only perfected by advertisement; that the allegations in their bill were false and fraudulent; Richard having no authority from the other heirs to convey, and the conveyance itself being conditional and not absolute as alleged; and therefore prays that said decree may be set aside as false and fraudulent; the land subjected to his debt in the hands of Galloway and others who purchased with full notice.

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The defendants answer, denying fraud, and setting up the decree in Baker's case. They demur to the residue of the complainant's bill.

WM. ELLSBERRY, for the plaintiff, cited 2 Bin. 455; 4 Ohio, 458; Sug. Vend. 303; 1 Har. Ch. 146; Rob. on Fr. 521; 1 Pr. Wms. 735, 737; 2 Pr. Wms. 73, 4, 5; 3 Pr. Wms. 104, 111, 371; 1 Johns. Ch. 194; 4 Johns. Ch. 202; 5 Johns. Ch. 69; 1 Ves. 287; 4 Ohio, 492.

ODLIN, SCHENCK, and G. J. SMITH, for the defendants, cited, Coop. Eq. 96, 217; 1 Johns. Ch. 194; 4 Johns. Ch. 202; 5 Johns. Ch. 69; 2 Pr. Wms. 111, 371; 1 Ves. 287; 4 Ohio, 492; 5 Johns. 566; 4 Kent. C. 454, e.

By the court, WOOD, J. Two questions are made in this case. 1. Is the fraud set up in the bill of the kind required to impeach a decree; and if so, is it sufficiently set forth? 2. Can a decree be impeached for fraud after the lapse of more than twenty-five years?

The first proposition, in our view, is of no importance in deciding this case, because the second is decisive of it. It is, however, a rule 180] \*applicable as well to decrees in equity as to judgments at law, that when a bill is filed to impeach either on the ground of fraud, the *particular and precise circumstances* which constitute the fraud must be stated: the acts done, or the words spoken which constitute the fraud must be set forth. *Expressio falsi vel suppressio veri*, or some fault, design, or wicked and evil intention, must be clearly set out in the bill, to which the defendant is called to answer: it will not do to impute mere laches to impeach a solemn adjudication of a court of justice. 4 Ohio, 492; Coop. Eq. 217; 1 Johns. Ch. 194. The only charge in this bill is, that Baker's heirs, in their suit against Campbell and others to quiet their title, did not set out a collateral writing given to Richard Campbell, showing his deed intended as a mortgage, without charging their knowledge that such writing was within their control. If such writing existed, it was matter of defence, and should have come from the other side.

2. The decree sought to be impeached was rendered more than twenty-five years since, and the long acquiescence of the complainants, and the too obvious staleness of the claim, should not call into activity the energies of a court of equity for its relief. Lord Camden, in *Smith v. Clay*, 3 Brown Ch. 640, said a court of equity is never active to relieve, when a party has slept on his rights, and acquiesced for a great length of time. Where reasonable diligence is wanting, this court is passive and does nothing. Laches and negligence are always discountenanced, and therefore from the beginning there was always a

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limitation to suits in this court. Lord North, in *Fitler v. Lord Macclesfield*, declared, that though there was no limitation to a bill of review, yet after twenty-two years he would not review a decree; that *interest rei publicæ, ut sit finis litium*, was a maxim that had always prevailed in equity, without an act of parliament. A court of equity is governed by the circumstances of the case before it. 2 Story Eq. 739. We think the circumstances disclosed in this case, require of us to sustain the demurrer to the bill.

Bill dismissed.

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ALMON SORTWELL v. SIMEON B. JEWETT AND OTHERS.

An assignment made by an insolvent debtor residing abroad, of land in Ohio, will not be superseded by a subsequent foreign attachment.

**BILL IN CHANCERY.** From Stark. This is a bill of interpleader, seeking to distribute the surplus moneys produced by the sale of \* mortgaged premises. The lands were mortgaged by Davis to [181 Strong, in May, 1836. They were sold by the plaintiff, as master commissioner in chancery, and after paying the mortgage money and certain other incumbrances against them, the sum of \$12,501, is left for distribution.

In October, 1836, Davis, living in New York, made a general assignment of his property to Jewett, Morley and Field, in trust to sell and pay his debts. The land covered by the mortgage, was conveyed by a separate deed to Jewett, to be held for this trust, and Jewett and Field, who accepted the trust, claim the money in the hands of the master.

In February, 1837, the land was seized by process of foreign attachment, issuing from the Common Pleas of Starke county, and the creditors, who have obtained judgment under that attachment, are entitled to the money, unless it belongs to the trust.

A. W. LOOMIS, STARKWEATHER, and JARVIS, for the attaching creditors, contended: 1. That the deed from Davis to Jewett, being without consideration, was void as against Davis' creditors; and is not executed according to law. 2. That Davis' assignment, made in New York, is inoperative in Ohio, against judgment creditors. 3. The assignment is not executed according to the laws of Ohio, and does



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not describe the land sold by the plaintiff. 4. The assignment has never been recorded in Ohio. 5. Morley never accepted the trust, or, if so, has severed it by prosecuting interests in conflict with it; and being concluded by the decree of the Common Pleas, it is incompetent for Jewett and Field alone to appeal. They cite the following authorities: 6 Johns. 42; 2 Fonb. Eq. 81; 2 Ohio, 234; 3 Ohio, 488; 2 Kent C. 406, 7, 8; 20 Johns. 266; 2 Wheat. 364; 13 Mass. 146; 5 Greanl. 245; 15 Pick. 18; 3 Pick. 128.

C. HITCHCOCK, and WILDER, on the same side, cited 5 Ohio, 293; 11 Wend. 189, 240; 7 Ohio, 2 pt. 247; 1 Bin. 518; 2 Johns. Ch. 43; 2 Ves. Sen. 628; 2 Pr. Wms. 203; 2 Ohio, 235, 237; 3 Ohio, 448; 6 N. Hamp. 85; 6 Mass. 336; 8 Greanl. 418; 2 Fairf. 41; 1 Monroe, 105; 9 Cowen, 543; 6 Johns. 39; 13 Mass. 146; Kirby, 313; 6 Bin. 353; 1 Har. and McH. 236; 2 Hayn. 24; 14 Martin, 93; 5 Cr. 298; 12 Wheat. 213; 5 Greanl. 245; 20 Johns. 240; 4 Johns. Ch. 471; 15 Pick. 18; Story Con. L. 346, 348, 9; 2 Story Eq. 302.

182] \*GRISWOLD, and GRANT, for the assignees of Davis, insisted that the deed of assignment executed in New York, according to the laws of that state, and describing the land sold, creating a trust for the laudable purpose of paying debts, was operative here. 29 O. L. 348; 2 Kent C. 532; 7 Ohio, 2 pt. 247; 8 Ohio, 390; 33 O. L. 13; 36 O. L. 71; 9 Cow. 69; 6 Johns. Ch. 417; 2 Kent C. 532, 406, 7; 4 Johns. Ch. 460, 471; 1 Am. Com. L. 588; 20 Johns. 229, 251, 238, 266; 6 Bin. 353, 361; 2 Blk. C. 285, 6; Story C. L. 336, 352, 382; 6 Pet. Con. 530, 1 Paige, 236; 3 Wend. 358; 1 Green's N. J. 326; 9 Conn. 487; 8 Ohio, 390; 1 Bin. 502; 7 Ohio, 2 pt. 246; 5 Ohio, 180, 293; 2 Bin. 182; 5 Greanl. 245; Doug. 170; 4 T. R. 182; 1 Ohio, 218.

H. R. SELDEN, of New York, for the same parties, cited, 4 Conn. 207; 4 Cruise Dig. 470; 4 Mass. 357; 1 Vern. 100; 7 J. Ch. 217, 223; 2 Cow. 118, 124, 126; 1 Bibb. 277; 5 Rand. 577; 1 Wash. 162; 5 J. Ch. 82, 3; 3 Lit. 57; 6 Har. and Johns. 485; 3 Dess. 12; 4 Dess. 20, 380; 3 Conn. 402; 3 Johns. 492; 14 Johns. 210; Wright, 755; 16 Mass. 223; 1 McCord's Ch. 130; 2 Atk. 155, 6; 11 Wend. 241, 8; 7 Pet. 614; 1 Har. and Johns. 687; 6 Pet. 400; 3 Wend. 550; 3 Ohio, 488; 1 Pet. 366.

By the Court, LANE, C. J. The question fairly arises between these claimants, whether an assignment of lands in Ohio, by a foreign debtor, and to be partly executed abroad, shall be postponed by a subsequent

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attachment, at the instance of one of our citizens. Our court has heretofore decided, in two reported cases, 2 Ohio, 235; 3 Ohio, 488, that a transfer of legal title to land can not be made by the operation of foreign insolvent laws. In the last case, although the assignment by law was accompanied by some act of the party, it was held that nothing passed, even in equity, without a formal deed, because the assignment of the party was a part of the law dependent upon it, and liable to be superseded with it. These cases adopt the very obvious principle, that a law has no effect upon land, except within its territorial jurisdiction; and are in conformity with the general current of American authorities. The effect of bankruptcy upon the personality, is not settled with so much uniformity. See cases collected in 2 Kent. C. 406; Story Con. L. 337.

The states of Maine, Massachusetts, and Louisiana, seem to go much farther than this, and declare that even a voluntary assignment \*by a foreign insolvent debtor, will be superseded by a subse- [183  
quent attachment. Most, or perhaps all, the cases show the assignment to be void, by the law of the jurisdiction in which the property is situated; yet an effort is made to place their conclusions upon some other basis than this—upon some rule of policy, that a state should preserve and prefer the rights of its own citizens, and exempt them from the laws and acts of citizens of other states. Neither the expediency nor the justice of this discrimination are admitted, especially as between citizens of the United States. The natural right of the owner of property, to dispose of it at his pleasure, depends on no localities, and is subject to no restrictions, except that of conformity with the law of the states. A compliance with these forms should avail equally to the stranger as the citizen; for the law which confers the authority to hold, should not impair the capacity to enjoy; and the distinction seems not only invidious, and too much in the spirit of meting out justice in different measures, but inconsistent with the rights secured by the constitution. Such doctrines are plainly adopted by those to whom we are wont to look either for precedent or authority. There is such a decided case from South Carolina; they are said to be followed in France, and Holland, and Scotland, and England, and are countenanced by the opinions of Kaimes, and Parsons, and Story, and Kent. It is unnecessary for us, however, to look beyond our own reports; in the last of which, 3 Ohio, 489, such a conveyance is recognized as good.

I need not examine by what law personality is regulated when held

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by a stranger : the present suit relates to land only. Its owner might lawfully dispose of it, although it lies abroad. It is only necessary to see if he adopted the forms required in our state, and whether the objects he sought, would be justified if undertaken by one of our own citizens. The deed possesses the ordinary requisites of a conveyance, and is free from objection. The trust imposes no restrictions upon creditors, and secures no advantage to the debtor, until the creditors are paid. The debtor divides his creditors into three classes, as they seemed meritorious to him, and secured the payment of those of each class in the same proportion ; a discrimination which does not invalidate, for it is one of the rights of the debtor. Such an assignment, if made now, would enure to the equal benefit of all the creditors ; but it is not affected by the act of 1835 ; and as it seems to aim at nothing except the speedy and effectual conversion of the effects into money, and the appropriation to debts, it presents no qualities inconsistent with our law.

184] \* We find, then, a regular conveyance to trustees upon lawful trusts, made in October, 1836. The attachment was not levied until February, 1837 ; and it operated only on those interests of the debtor which had previously become extinct. As the parties are before us, a decree may be taken, referring to a master, to take an account of the present state of the trust, preparatory to further proceeding.

Cause remanded.

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#### LESSEE OF URIAH SCRIBNER v. W. B. & S. D. LOCKWOOD.

Where a person conveys land, which is afterwards taken in execution, sold, the sale confirmed and deed ordered, before the first deed is recorded, the purchaser at sheriff's sale is regarded a *bona fide* purchaser from the time of sale, and protected as such, though the first deed be recorded after the confirmation of sale, but before the sheriff's deed is made.

*Quere :* If in such case the notoriety of the proceedings in the judicial sale, would not be held constructive notice to the purchaser at the individual sale ?

The registry laws apply to purchasers at sheriff's sale.

**EJECTMENT.** From Sandusky. The case is submitted upon an agreed statement of facts. The plaintiff claims the west part of the

## Lessee of Scribner v. Lockwood.

S. E. Qr. of frac., S. 2, 6 T. and 13 R. under a deed from Samuel Scribner, and the defendant under a sheriff's deed, upon a judgment and execution against S. Scribner. The plaintiff's deed was executed in New York, the 26th Dec. 1823, and recorded the 28th June, 1825. The judgment against Scribner was rendered at May term, 1824, of the Huron Common Pleas. A fi. fa. issued upon this judgment, which was levied on the land in controversy, in Sandusky county, the 3d of Sept. 1824, on which the land was sold to William Townsend the 12th of March, 1825. This sale was confirmed by the court at May term, 1825, and a sheriff's deed executed the 9th of August in that year. Scribner and Samuel Brown, by their agent, were in possession of the ground until 1823, when Scribner left Ohio, and Brown in possession. No information was received by Brown or those in possession, of the deed from Samuel to Uriah Scribner, until after the sale to Townsend. Samuel Scribner never returned to Ohio, and Uriah resided in New York. Townsend went into possession immediately after his purchase, and the defendants now hold his title, and that of Brown for the other half, and are in possession.

C. L. BOALT for the plaintiff, insisted that S. Scribner, at the time of the levy, had no interest in the land. 22 O. L. 108. The delay in \*recording the deed to the plaintiff's lessor, would not let in the [185 subsequent deed of the sheriff upon a sale made before the record, particularly as the sheriff's deed could only convey the title Samuel Scribner had at the time of the levy. 3 Wheat. 449; 4 Cow. 599; 9 Cow. 120; 1 Wend. 504; 6 Wend. 213, 225; 8 Wend. 626; 15 Wend. 596; 1 Green N. J. 43, 53; 6 Cow. 227; 1 Pet. 559; Sug. Vend. 320, 520; Eq. Ca. Ab. 625; 1 Atk. 384; 10 Pet. 209; 1 Wash. 41; 3 Leigh 365; 7 Monro 599; 3 Yerg. 408, 508; 3 Hen. & Mumf. 316; 2 Bibb, 442; 1 Johns. Ch. 288, 301; 1 Marsh. 363; 3 Marsh. 13; 1 Yerg. 297; 2 Litt. 276; 1 Cook, 168; 1 Ohio, 336, 458; 4 Ohio, 66; 4 Day, 222; 15 Johns. 316; 3 Cow. 75; 5 Hals. 200; 8 Cow. 536; 5 Day, 160; 12 Johns. 140; 1 Bur. 20; 2 Bur. 945; 6 Mon. 204; 1 Blkf. 91; 2 Cox Ch. 393; 17 Wend. 30; 1 Root, 453; 5 Cow. 38; 6 Ohio, 447; 8 Conn. 536.

G. REBER, and F. D. PARISH, and T. EWING, for defendants, contended that a purchaser at a judicial sale, which more than all others abides in the faith of the law, should receive the benefit of the registry act. They cited and commented upon the following authorities: 9 Cow. 120; 8 Wend. 626; 15 Wend. 596; 8 Co. 87; Yelv. 179; 10 Pet. 249; 1 Green, 59; 6 Ohio, 447; 5 Serg. & R. 225; 9 Serg. & R.

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156; 11 Serg. & R. 138; 1 Pet. 552; 5 Hals. 193; 18 Vin. Ab. relation, 8; 5 Bur. 2674; 15 Johns. 309; 1 Blkf. 22; 12 Johns. 140; 1 Bur. 20; Wrights, 520; 3 Wheat. 21; 4 Johns. 222; 7 Serg. & R. 199; 10 Serg. & R. 207; 13 Serg. & R. 169; 10 Johns. 462; 1 Pet. 552, Co. Lit. 18; 1 Atk. 384; 2 Atk. 630; 1 Johns. Ch. 288; 7 Johns. Ch. 41; 1 Wash. 31; 11 Wend. 412; 13 Law. Lib. 40; 2 Saund. 148; 2 T. R. 596; 1 Salk, 87; 3 Salk, 116; 6 T. R. 368; 4 Cow. 599; 6 Wend. 213; 10 Pet. 476.

By the Court, GRIMKE, Judge. Two questions are apparently involved in the present inquiry: 1. Was there such an estate in the debtor as was liable to execution at the date of the levy? 2. May the purchaser at sheriff's sale avail himself of the benefit of the registry acts? But in reality these two questions are resolvable into one. The execution and delivery of a deed do not always transfer the title of the grantor. The law has directed further, that such deed shall be [186] \*recorded within a limited time; and if it is not, circumstances may arise which may prevent the estate from being vested in the grantee, and may enable it to be transferred to a subsequent purchaser without notice. I observe that the Supreme Court of New York have taken a different view of the law on this subject. In *Jackson v. Town*, 4 Cow. 599, it is supposed that if the judgment debtor has previously sold, that then the estate is not the legitimate subject of execution as against him; that there was no interest on which the execution could operate, and this doctrine was approved in the subsequent case of *Jackson v. Jacoby*, 9 Cow. 120. But although thus confirmed, it was very near shaken in the case of *Jackson v. Chamberlain*, 8 Wend. 626, and in *Jackson v. Post*, 15 Wend. 588, it was entirely overruled. In this last decision, speaking of the case in 4 Cowen, it is said that the deed from the judgment debtor, was valid as between the parties and others having notice, but as against subsequent *bona fide* purchasers it was void; and it is added, that a deed from the sheriff would have the same force and effect as a quit claim deed from the debtor of the same date would have had. Whether this last case is itself entirely free from exception, remains to be seen. There is undoubtedly a striking analogy between a deed taken immediately from a party, and one executed immediately by him, and through the intervention of the sheriff; but if the analogy is not perfect throughout, it may, where the resemblance fails, cause a very different rule to be applied to the one from what would be applicable to the other.

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Lessee of Scribner v. Lockwood.

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Our statute declares that the sheriff shall make to the purchaser, as good and sufficient a deed of conveyance for the lands and tenements so sold, as the person against whom the writ of execution was issued, could have made for the same, at or any time after the lands became liable to the satisfaction of the judgment. It will be observed that the words are not, after the land became bound by the judgment, but after it became liable to the satisfaction of it. What might be the effect of this phraseology, where the lands lie in the same county as that where the judgment is rendered, and the deed from the judgment debtor is recorded after the judgment, but before the levy, it is unnecessary now to say. The lands in this instance lie in a different county, and were therefore in every sense of the words liable to execution at the date of the levy. *It might, perhaps, in the first case, be proper to consider the judgment as exerting its binding efficacy up to the period when the order of confirmation of the sheriff's deed was made, and that when that [187 act was done, it superseded the judgment, as then no longer necessary to the title.*

But it is entirely unnecessary to make this distinction here, since the purchaser had paid the purchase money, the sale had been confirmed by the court, and the sheriff was directed to deliver a deed, all before the conveyance to the plaintiff was registered. The question then is, not what would be the effect of this last deed, if it had been recorded at any period after the judgment and before the sale, but what is its effect, where it is not recorded until after everything has been done, with the single exception of the delivery of a deed. The various steps which are taken in order to perfect a title derived through a judicial sale, are very different from anything which takes place on a private sale from one individual to another. In the last case, if any negotiation precedes the execution of the deed, it is a matter in pais only, while in the latter every ceremony which is performed is either matter of record or of public notoriety. Now it appears to me, it is not going too far to say, that if a purchaser neglects to record his deed before a sale by the sheriff, the payment of the whole purchase money, and a confirmation of the sale by the court, that it is too late for him to say that the purchaser under this sale is not a *bona fide* purchaser; it would be nearer correct to say that he himself was a purchaser with notice, and that his deed should be postponed for want of being registered in time. It is a circumstance too of some importance, that the purchaser at sheriff's sale could not recover back the purchase money, if there was a failure of title. He is compelled to take a deed with-

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*Lessee of Scribner v. Lockwood.*

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out warranty, whereas the purchaser from an individual can always guard himself against a contingency of that kind.

The plaintiff contends, that inasmuch as his deed was recorded before the execution and delivery of a deed by the sheriff, that the common principle of law, that notice received any time before the conveyance, is well as before the payment of the purchase money, has a direct application, and that its effect is, to put aside the title of the defendant; and this would undoubtedly be true, as I before said, if the analogy between a sheriff's deed and a deed from a private individual was perfect throughout. It is a very common error, where there is a general resemblance between two things, so as to subject them, in some measure, to one common law, to suppose that this law is of universal applicability, and that it furnishes the governing rule where the resemblance fails as well as where it is preserved. The various steps of the process through which a judicial sale is perfected, are something [188] very different from what takes place in a private sale; and \*this is the true foundation of the doctrine of relation, as applied to a sheriff's deed. It is not merely because something has been previously done similar to a private negotiation between individuals, it is because something importing the greatest solemnity, has intervened between the levy of the execution and the actual delivery of the deed. In the former case there might be infinite mischief if the deed related back. In the latter there would be no danger at all. And thus in *Jackson v. Dickerson*, 15 Johns. 309, land was sold at sheriff's sale on the 1st of March, and the sheriff's deed executed on the 18th. On the 10th of the same month a bill in chancery was filed by a mortgagee to foreclose, to which the purchaser at sheriff's sale was not made a party. It was decided that he was not bound by the decree for he was in by relation, from the day of sale. The reason which is sometimes given for this doctrine of relation, is, that where a purchaser takes by the execution of a power, he is in and holds under the authority creating the power. *Jackson v. Bull*, 1 Johns. Ca. 81, is not very satisfactory. It would carry the principle infinitely farther than we would be authorized to do. It is much more reasonable in the present instance to say that where a person has purchased at sheriff's sale, has paid the whole consideration money, obtained a confirmation of the sale, and an order for a deed, that these steps not only constitute so many acts of public notoriety, but that they also contribute so completely to identify the land and consummate the sale, that he whose title is perfect up to this period, shall not be disturbed in consequence

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of the registry of another deed, before his own is actually delivered ; that he is in truth a purchaser without notice, and that the registry of the other deed before he receives his own conveyance, which would be a circumstance of the greatest importance, if both deeds were private conveyances, is in reality of no moment in his case.

I do not think it necessary to enquire whether the proceedings may be considered in fieri after the last act of the court has been performed, and whether the purchaser might, on motion, succeed in having the sale set aside and the purchase money returned. The plaintiff has been guilty of such gross neglect, that he has no right to call upon the defendant's grantor to take that position, and in numberless instances, the whole mischief would be perpetrated before this remedy could be employed.

The conclusion at which we have arrived is, that inasmuch as the deed from Samuel to Uriah Scribner was not recorded until after the levy, sale, confirmation by the court, and the payment of the purchase money by Townsend, that the delivery of a deed is consequent on \*these proceedings, was a mere formal act, and that the title of [189 the defendant therefore takes precedence of that of the plaintiff.

The cause has been very ably argued by the counsel on both sides, and I feel greatly indebted to them for the light which their researches have afforded in the investigation.

Judgment for defendants.

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OLIVER O. BREWER AND OTHERS v. THE STATE OF CONNECTICUT.

An appeal lies from a decree in chancery taken by consent.

The failure of a purchaser of land to make payment of the purchase money for nine years after it became due, connected with an abandonment of the land itself, will not be specifically enforced, but may be rescinded.

Purchasers upon mere speculation, at a nominal price, do not commend themselves to the favorable regard of the court.

**BILL IN CHANCERY.** From Portage. The bill in this case was originally filed in the court of Common Pleas, and the cause was heard there upon the bill, answers, exhibits and testimony, and a decree rendered, by consent of parties, against the defendants. From this decree the defendants gave notice of appeal, and perfected the appeal by bail, according to law. In the Supreme Court a motion was sub-



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mitted by the complainants' counsel, to dismiss the appeal, and this motion, as well as the questions upon the merits of the case, are now before the court. The facts of the case are so fully stated in the opinion of the court, as to render it unnecessary to recapitulate them.

KIRKUM, and SPALDING, for the complainants, insisted that the appeal could not be sustained, inasmuch as the decree was by consent. That in such case the party against whom a decree was rendered, could not be aggrieved, and unless aggrieved, could not appeal. To sustain the motion to dismiss, they cited the following authorities. 8 Wend. 219; 2 Camb. N. Y. Dig. 496, 7, 8, 9; 1 Cow. 691; 5 J. Ch. 564; 6 Ohio, 530; 12 Johns. 534; Ambler, 229.

Upon the merits of the case, they cited 4 Kent C. 6, 141, 158, 162, 163, 186; Wright, 249; 2 Story Eq. 287; Walker's Introduction, 302, 303; 1 Vern. 232; 2 Vent. 364; 2 J. Ch. 30; 2 Cow. 324; 1 Murphy, 117; 5 Ohio. 346; 6 Johns. Ch. 402; 3 Johns. Ch. 316; 7 Johns. Ch. 40, 174; 2 Cow. 332; 1 J. Ch. 497; 1 Peters, 373; 1 190] Johns. Ch. 566; 4 J. Ch. 136; \*1 Vern. 138; 7 Cranch, 218; 2 Pick. 505; 1 Ohio, 519; 3 Ohio, 327.

W. SILLIMAN, J. ANDREWS, and WOLCOTT, for the defendants, admitted that by the rules of chancery practice in England and New York, the appeal could not be sustained, but they insisted that the case was clearly within the statute of this state regulating the practice in chancery. They cited 6 Ohio, 530.

They argued the case at great length upon the merits, and cited 7 Ohio, 2d pt. 73, 91; 1 Bridgman's Eq. Dig. 42, 4, 38; 1 Ves. 686, 667; 5 Ves. 722; 1 Br. Par. C. 27; 2 do. 447; 1 Ball. & Beat. 63; 4 Pet. 34; 4 Eng. Ch. 404; 1 Maddox, 418.

By the Court, HITCHCOCK, Judge. The motion to dismiss the appeal in this case, is founded upon the supposition that an appeal in chancery can not be sustained where the decree in the court below, and from which the appeal was taken, is entered by consent. That such is the case in England and New York, would seem to be evident, from the authorities cited by the complainants' counsel. But before these authorities can be considered as effective in this state, it must be shown that the laws of the countries where the decisions were made, are similar to our own upon the subject of appeals. This subject, since the first organization of the state government, has been regulated in this state by statute. And when a question arises as to the propriety of sustaining an appeal, it is the duty of this court to look to our statutes, and if, by a fair construction of those statutes, the

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appeal can be sustained, we are bound to do it, regardless of the practice in other states and countries upon the same subject. In construing these statutes, the same rules must be observed as in construing other statutes, the great object being to ascertain the meaning and intent of the law, from the language therein used. And this court could not be justified in giving a forced construction to the language and phraseology of a statute, in order to make the practice in our courts, either in law or equity, conform to the practice of the courts in other states and countries.

As before remarked, the subject of appeal in judicial proceedings has been, in this state, from its first organization, regulated by statute. And the right of appeal, both in cases at common law and in chancery, has been secured in almost every possible case to the parties litigant. The principle seems to have been adopted as a general rule, that the decision of the court having original jurisdiction of the \*matter litigated, shall not be conclusive [191 of the rights of the parties, if either desire to remove the case to a superior tribunal. This is the policy of the law, and it is the duty of this court to give it effect.

The law regulating appeals in chancery, will be found in section 55 of the act of March 10, 1831, "directing the mode of proceeding in chancery." 29 Ohio L. 81. It is in these words: "Any person, or the heirs or representative of such person, may appeal to the Supreme Court, from any final sentence or decree pronounced and made in any case or suit in chancery in the court of common pleas, on giving notice and security within the time required by law, in cases of appeals at law." It is impossible for me to conceive of language which could be more clear and explicit, and which would secure to suitors more effectually the right of appeal. As to the extent of this right, there is no limitation, except that there shall be first a "final sentence or decree pronounced." As to what amounts to a "final sentence or decree," there may be some doubt and some room for construction. We have held that a sentence or decree, conclusive of the rights of the parties, is such "final sentence or decree." But when this is ascertained, there is no limit as to the right of appeal, nor room for construction with respect to it. In order to sustain the position assumed by the complainants' counsel, we should be under the necessity of adding to the section quoted, a proviso, to the following effect, "*that such final sentence or decree*" shall not have been pronounced or made by.

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*and with the consent of the party appealing.* This is beyond our power. And even were we inclined to do it, we could not in conformity with the practice heretofore adopted. It is true that there is no case reported in which the question has been directly made and decided, but we know that it has been the uniform practice to appeal from decrees so made, and to sustain such appeals. In fact it is not within my recollection, that the propriety of such practice has ever before been questioned. Although no case is reported in which the point is directly made and decided, yet in the case of *White v. Bank of the United States*, 6 Ohio, 529, the right of appeal in such cases is virtually recognized.

It is urged by the counsel for complainants, that the right of appeal from judgments at law, is as general as from decrees in chancery, and that as this court do not sustain appeals from voluntary nonsuits, and from confessions of judgments, it ought not for the same reason to sustain appeals from decrees made by consent. So far as respects judgments by confession, there can not be said to be any settled practice of the court, but it is true that 192] appeals are not sustained from \*voluntary nonsuits. And it is believed that such practice is in conformity with the provisions of the statute.

Section 108 of the act regulating the practice of the courts of law, allows appeals. It provides, "that in civil cases an appeal shall be allowed, of course, to the Supreme Court, from any judgment or decree rendered in the court of common pleas, in which such court had original jurisdiction." 29 Ohio L. 56. This section, however, is not the only one in the act providing for an appeal. In section 96 it is enacted, "that, in all cases where a nonsuit *may be directed* by the court of common pleas, by reason of irrelevancy of testimony," etc., "the plaintiff shall have the same right to appeal, as in other cases." Now, if it was intended to give the right of appeal in cases of nonsuit by section 108, why was this provision made for a particular class of nonsuits in section 96? No good reason can be assigned for it. And taking the two sections together, I can come to no other conclusion than this, that it was not the intention in section 108 to give the right to appeal from any judgment except such as are final and conclusive upon the parties. Such not being the effect of a judgment of nonsuit, as the plaintiff could commence another suit, he has not the

right to appeal from such judgment by this section, but that right is secured to him in the cases specified in section 96.

The provisions contained in section 96, before referred to, were first introduced into the statutes in February, 1813. 1 Chase's St. 795. Previous to that time the right to appeal was secured to the parties in as general terms and in precisely the same words as in section 108 of the act of 1831. 1 Chase's St. 711. And yet the Supreme Court had uniformly decided that an appeal could not be sustained from any judgment of nonsuit. This fact was well known to the general assembly. Still that body, possessing this knowledge, and acting upon this subject, made no other change than to provide that from a particular class of nonsuits an appeal might be taken. 2 Ohio, 87.

Under these circumstances, no valid argument can be drawn from the practice of this court relative to appeals in cases at law, to justify us in sustaining the motion of the complainant, and the same must be overruled.

Having disposed of the motion to dismiss the appeal, I will now proceed to consider the case upon its merits.

The facts of the case, as disclosed in the pleadings and testimony, are as follows: At an early period, the precise time not known, \*James Dailey purchased of Joshua Stowe, by con. [193 tract, two tracts of land, in the township of Stowe, in Portage county, one containing 160 and the other 40 acres. Whether the two tracts were purchased at the same time, or were separate purchases, is uncertain. It is alleged by the complainants, that at one time Dailey had a deed for the larger tract, executed by the agent of Stowe, which was afterward redelivered or destroyed, but of this fact there is no sufficient evidence. The original price of the land is not ascertained by any of the proofs in the case, but it seems that payment, in part, was made from time to time, although there is no evidence as to the amount thus paid.

On July 8, 1825, a new contract was made between Stowe and Dailey, relative to the same land, by which Stowe agreed, upon the performance of the covenants therein contained, by Dailey to be performed, to convey to him the land. Dailey on his part covenanted to pay \$310.29, as the purchase money; and to secure the payment, at the request of Stowe, to execute his bond to Isaac Spencer, treasurer of the State of Connecticut, for the use of the school fund of said state, conditioned for the payment of that

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money to said state, by September 2, 1827, with annual interest to be computed from September 2, 1825. Dailey further covenanted to pay the taxes upon the land as the same fall due, to commit no waste, and to make no assignment of the contract without the consent of Stowe. It was further expressly stipulated that if Dailey should fail in the performance of any of his covenants, then Stowe should be released from performance on his part. On the day of the contract, Dailey made the bond to the treasurer of the State of Connecticut, according to the stipulation. On the same day, Stowe being indebted to the State of Connecticut, proposed to deed the land, in the contract described, to the State of Connecticut, in part payment of said debt, subject to said contract with Dailey, and the agent of the State of Connecticut made an indorsement upon the contract to the effect, that if such conveyances should be made, and if Dailey should pay his bond to the state agreeably to its tenor, then the said state would release to Dailey all her right and title to said land. The making of this contract, the indorsement on the same, and the execution of the bond, appear to have been parts of one and the same transaction, and the whole arrangement was entered into by Stowe, Dailey, and the State of Connecticut, by her agent.

In April, 1826, Stowe conveyed the land to the State of Connecticut, and received a credit equal to the amount secured by Dailey's bond, and by that conveyance vested the legal title in the State of Connecticut. Stowe, at the same time, assigned over to said state his duplicate of the contract with Dailey. Dailey remained in possession of the land until 1826, when he died, leaving a widow, or a woman to whom he had been married, and supposed to be his widow, and a number of children. Administration was granted upon Dailey's estate to one of his children. No part of the purchase money, of the interest, or of the taxes, was paid during Dailey's life, or by his administrator or heirs, after his death.

In 1828, Leonard Case, acting as the agent of the State of Connecticut, and having the bond of Dailey in his hands for collection, had an interview with the administrator and urged him to make payment. This the administrator refused to do, assigning as reasons that the estate was insolvent, that he had not the means of paying, and that his co-heirs would not assist him to do it. At length an arrangement was made, by which Case agreed for the

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State of Connecticut to pay the administrator \$100, and the administrator agreed to give up the contract, and cancel the bond, which was done. The possession of the land was then abandoned. On September 1, 1823, the land was conveyed by the State of Connecticut, to Orrin Gilbert, one of the defendants, who took immediate possession, and has been in possession ever since, making large and valuable improvements. In its present improved state, it is worth from \$5,000 to \$6,000.

James Dailey, before removing to Ohio, was residing in the State of Virginia, with a woman supposed to be his wife, by whom he had three children, John, James, and Nancy, intermarried with John Moreton. This woman was living when he came to Ohio. In this state he married another woman, by whom he had several children, and with whom he lived until his death. There is no proof that the Virginia children ever resided with their father in Ohio. No movement, so far as appears, was ever made by the heirs of Dailey, to make payment to the State of Connecticut, or to procure a title to the land. In August and September, 1836, one Oliver O. Brewer procured separate deeds of release from James Dailey, of Virginia, John Dailey, of Coshocton county, Ohio, and Nancy Moreton, of Wayne county. The releasors claim to be the heirs of James Dailey, deceased, and release to Brewer all their interest in their father's estate. The whole consideration of these deeds is \$120. In October, 1836, Brewer tendered to Case, as agent of the State of Connecticut, \$575, as the balance due [195 upon Dailey's bond to the state, and claimed a fulfillment of the contract between Stowe and Dailey, which had been assigned to the state.

The bill is filed by Oliver O. Brewer, John Dailey, James Dailey, and John and Nancy Moreton, against the State of Connecticut, Joshua Stowe, and Orrin Gilbert. The prayer of the bill is that such of the defendants as have title to the premises be compelled to convey to Brewer, and to account for the rents and profits.

It is claimed for the complainant, Brewer, that by his purchase, he is entitled to the whole interest which was vested in James Dailey at the time of his death, the other children of the decedent being illegitimate and incapable of inheriting from their father. If we were carefully to examine all the testimony in the case, there would perhaps remain some doubt upon this point, to say the

least of it, but in the view we take of the case, it is a point entirely immaterial.

The principal position assumed by the counsel for the complainant is, that the conveyance by Stowe to the State of Connecticut, was a mortgage, that the equity of redemption was vested in Dailey, and descended to his heirs. That "in equity the character of the conveyance is determined by the clear and certain intention of the parties, and any argument in the deed or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the repayment of money," will make it a mortgage, and give to the mortgagor the right of redemption, there can be no doubt. But was this a transaction of this kind? It seems to me not. A contract was made between Stowe and Dailey, for the sale of these lands, for which a specified sum was to be paid. Stowe being indebted to the State of Connecticut, in part payment of this debt, assigned over this contract to the state, and conveyed to the state the land which was the subject matter of the contract, and the state on her part undertook to fulfill the obligations of Stowe—in other words to convey to Dailey when the purchase money should be paid. Dailey assented to this arrangement, and in fact made his bond to the state for the payment of the purchase money. In consequence of this arrangement, the State of Connecticut acquired all the rights of Stowe, and was subjected to all his obligations with respect to this property. And in deciding the case, we must be governed by the same principles we would be, were the case between the representatives of Dailey and Stowe alone, or had the contract been originally made between the State of Connecticut and Dailey.

196] \*Considering the case, then, as if it were between Stowe and the present complainants, or as if the contract had been originally made between the State of Connecticut and Dailey, what are the circumstances? On July 8, 1825, a contract was made by which Dailey agreed to purchase the land in controversy, for which he covenanted to pay the price stipulated, in two years from the 2d day of September then next ensuing, thereby fixing the day of payment upon September 2, 1827. He further agreed to pay the interest annually, and the taxes, and he also bound himself not to assign or transfer the contract without the assent of his vendor. That time was of the essence of this contract, is apparent, for it contained a stipulation that if the vendee should fail in the per-

formance of any of his covenants, then the vendor should be released from performance on his part. Every one of these covenants have been violated by the vendee during his life, or by his representatives since his decease. Neither the purchase money, the interest, nor the taxes were paid in time, nor have they been yet paid. And the legal representatives, or pretended legal representatives of Dailey, have attempted to transfer his interest in the contract, contrary to his express covenant. True, in October, 1836, Oliver O. Brewer offered to pay to Case the balance then due the state, but Case denies that at that time he was the agent for the State of Connecticut. But admitting that he was the agent, was this offer made in time? The first installment of interest fell due on September 2, 1826; the principal fell due on September 2, 1827; the land itself was abandoned by the representatives of Dailey, in the spring of 1828, and was sold to the defendant, Gilbert, in the fall of the same year. This offer, then, was not made until more than ten years after the first payment of interest should have been made, more than nine years after the principal should have been paid, and more than eight years after the land had been abandoned and the contract given up to the vendor. Under these circumstances it seems to us that there was clearly an abandonment of the contract, and that the complainants can not now set it up as against these defendants.

It seems to be thought, however, that in favor of heirs this contract should be resuscitated and enforced; but it must be remembered that the heirs of James Dailey have no interest in this suit, or if they have, that interest is against the real complainant. For although three of the children of Dailey are named as complainants, Oliver O. Brewer has the sole interest in the case. The prayer of the bill is, that a decree may be made in the case which would result to his benefit alone.

\* For a mere pittance he has purchased from heirs, as he [197 says, a property worth from \$5,000 to \$6,000. In order to enforce his claim, he would stigmatize the ancestor of those heirs as having been guilty of bigamy, and further would bastardize a majority of the children of that ancestor. However anxious this court might be to protect the rights of heirs, it does not seem that this complainant is very desirous to do it, nor do we see that he is entitled to any peculiarly favorable consideration.

**Bill dismissed.**



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Ramsdall v. Craighill et al.

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## JACOB RAMSDALL v. W. B. CRAIGHILL ET AL.

By marriage the husband becomes the owner of his wife's personal property, and if they unite in selling her realty, and receive the money, that is his also; and if it is invested in real estate, and the title taken to himself, the estate is his.

The debts of a deceased person are a lien on the land of which he died seized, in default of personal assets, whether devised or cast by descent, which can only be removed by the payment of the debts or the lapse of time.

An injunction operates from notice to the defendant, or its service.

IN chancery. From Huron. This bill seeks to quiet the complainant's title to two hundred acres of land, in Danbury, Huron county. The facts of the case, as they appear in the pleadings, exhibits, and evidence, appear (as well as they can be extracted from a mass of loosely drawn papers), to be substantially these: Gabriel Villard died intestate, leaving a widow, Josette, and three daughters, his heirs at law. The widow took out administration, and managed the estate for herself and children. She realized from the estate \$900, \$200 of which were adjudged to her under the law for her year's support.

After this, Mrs. Villard and one Charles Bebo, went together to the land office in Bucyrus, and each purchased a tract of sixty acres of land adjoining, near Port Clinton. Shortly after this they intermarried. Bebo and his wife sold these two tracts to General Lytle, in 1827, for \$1,100, and Bebo then bought of the complainant the tract in controversy for \$900, and received a deed for it in presence of his wife and others. The deed remained in Bebo's possession without being recorded at his death. Mrs. Bebo, though she expressed no dissatisfaction with the deed when interpreted to her, yet expressed some dissatisfaction before his death; and afterward set up a claim, that the land sold to Lytle [198] was in part purchased with \*her money, and the avails applied to purchase of the complainant, the land in dispute, and should belong to her. She kept the deed in her possession till she died; when John Valicot, who had married one of her daughters, by Villard, got possession of it, and delivered it up to the complainant. Mrs. Bebo, by will, devised all her real and personal

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estate to Valicot and his wife, and they, claiming this land under the will, *released to the complainant*.

The defendant, Craighill, was administrator of Bebo, and the heirs of Villard obtained a decree against him in chancery, for their portion of their father's estate, which came into Bebo's hands upon his marriage with their mother. The debts due by Bebo, with the amount of this decree, exceeded the amount of Bebo's personal assets; and upon the administrator's application, the court of common pleas ordered him to sell the land in controversy, for the payment of these debts. In pursuance of which order he sold to the defendant, Gallagher, who now sets up that claim. This sale took place two days after the bill in this case was filed, and upon notice that Craighill was in possession claiming title; but it does not appear that process had been served. The sale has been approved by the court, a deed ordered, and the money paid.

BOALT and WORCESTER, for plaintiff, insisted that he had good title and possession to the land, and should be quieted. They cited 8 Ohio, 1 pt. 170; 22 Ohio L. 130.

D. HIGGINS, for the defendants, contended the estate was in Bebo, at his death, and that Craighill acquired no title by the release of Valicot and wife, under Mrs. Bebo's will. As to the sale to Gallagher, it must be held valid, as the court, having jurisdiction of the subject, have ordered and approved. But, however that may be, the plaintiff is a stranger to Bebo's estate, and can not call the proceedings in question. If there were any trust in the land resulting to Mrs. Bebo, from her having paid part of the purchase money, it is only to one-half; and in that event, Bebo's estate should be credited with advances for Mrs. Bebo's debts, to her children.

By the Court, WOOD, J. The first question arising in this case is, what title has the plaintiff to authorize him to invoke the aid of this court to quiet him by injunction? When Bebo married Mrs. Villard, he became immediately entitled to all her personal property. When he and his wife united in selling the land they held at Port Clinton, \*the proceeds being personalty, by [199 like operation of law, were his. With the money he purchased of the complainant the land in dispute, and took a title to himself, as he had a right to do. The legal estate being thus vested

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in him, he died seized, and it passed by descent to his heirs at law, subject to the payment of his debts, and it made no difference, in this respect, whether the descent was cast upon his or any other heir. But it is said Bebo defrauded his wife in taking a deed in his own name, and that, inasmuch as *her* money entered into the purchase, equity will declare the estate hers, or so much of it as was purchased with her means. The answer to the allegation of fraud is, that she was present when the deed was executed and received, heard it explained, made no objection to it, and must be presumed to have assented to its form. No objection from her was heard till some time afterward, when it was too late to affect the right. It is true, Bebo, when she complained, *said it should be conveyed to her*, but nothing was done. This does not show fraud, nor does it evidence any original understanding, that she was to keep any portion either of the personal or real property. The plaintiff, then, must resort to some other ground to sustain his right; and he avers that Bebo left no heirs but *aliens*, and as they did not appear to claim the estate, it vested in *his widow*, and by her will was passed to Valicot and wife, and to him by their release. This does not aid the plaintiff in the least, if Bobo's estate was in debt beyond his personal assets; because the debts are a lien on the land, let it be cast upon, or transferred to whomsoever it may, which could only be extinguished by their payment.

Fraud is also charged upon the administrator and the purchaser, Gallagher, in the sale by order of the probate court, but there is no evidence to support the charge, nor in any way to impeach the fairness of these proceedings. It is further alleged that these probate proceedings were *irregular and void*, among other things, because the preliminary injunction in this case was allowed before the sale. Although that is true, yet as it was not served until two days after the sale, it could only operate upon the administrator from the time he received notice.

In any view we can take of this case, it seems to us very clear that the plaintiff has no ground for relief in equity, and the injunction must be dissolved. Bill dismissed.

**\*LESSEE OF JOSEPH CREPS v. DAVID WILKINSON. [200**

The grant of lands by the United States for the Black Swamp road, did not pass lands sold on credit in 1817, the credit for which had been extended.

EJECTMENT, for lot 93, in Perrysburgh. From Wood. The plaintiff shows a patent from the United States, for the lot, dated in 1834. The defendant traces his title to a deed from the governor of Ohio, to McKnight, in 1830. The authority to make this deed depends upon the extent of a grant made by act of Congress to the State of Ohio, in 1823, for the Black Swamp road. By section 2 of that act, Swan's L. L. 153, "a tract of land one hundred and twenty feet wide, on which to locate the road, together with a quantity of land, equal to one mile on each side thereof, is granted to the state." The third section of the same act provides, that "in case any of the lands, through which it may be thought expedient to open the road, may have been previously sold by the United States, the secretary of the treasury is directed to pay over the net proceeds of the sales of the quantity thus sold, at the minimum price." Lot 93 was sold by the United States at the land sales in Wooster, in 1817, and one-fourth of the purchase money paid. The other installments not being paid, the land became liable to forfeiture. The defendant claims that it was forfeited, and being *then* the absolute property of the United States, it passed to Ohio by this general grant, within the limits of which it is admitted to lie.

J. STETSON, for the plaintiff.

COFFINBERRY and SPINK, for the defendant.

By the Court, LANE, C. J. It will be remembered that when this lot was sold, in 1817, the credit system for the purchase money of public lands, was in operation. Our government had, at all times, been a lenient creditor. It has never been its policy to enforce the forfeiture of land against purchasers, with any degree of strictness. A system of relief laws was early adopted, and times of payment were extended by various regulations, until the general act of March, 1821, abolishing all sales upon credit. By this act debtors for lands were classified, and a forfeiture not

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exacted until a non-payment of three months after the times thus extended. Under these acts the rights of the purchaser of this lot were not extinguished until 1829. This arrangement Congress had a right to make; the land was liable to become forfeit, but 201] Congress only could take advantage of the \*neglect of the purchaser, to divest him of his title to the lands. By this act, the privilege was waived, and the forfeiture postponed until after the neglect to pay the last installment.

Such were the rights of the purchaser at the time of the grant to the State of Ohio. The terms of section 1 are large enough to embrace the lot in question; but section 3 relates to lots "which may have been sold," and secures to the State of Ohio the net avails only of such lots at a minimum price, implying that the land itself was not conveyed, but remained in the United States. The grant took its whole effect at its date, and conveyed only those lands "which had not been sold," not those in which individuals had an interest, and which might afterward revert to the United States by forfeiture. At the time of the grant the United States recognized an interest in the original purchaser, which they assumed to protect, and evidently did not mean to convey to the state. Judgment for the plaintiff.

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**SAMUEL STRONG, FOR THE USE OF C. REED, v. S. R. DARLING AND S. B. WALCOTT.**

A contract for the sale of a town lot is valid, although the town has not been surveyed, platted, and recorded, according to the provisions of the statute.

A statutory imposition of a mere penalty upon the performance of an act, does not necessarily vitiate the contract itself.

**COVENANT.** From Lorain. The suit is brought upon a sealed land contract between the parties, dated March 22, 1836, by which the defendants "bind themselves, their heirs and administrators, to pay or cause to be paid to the plaintiff, his heirs, etc., the sum of \$350, in manner following—that is to say, fifty dollars on July 1, 1836; \$100 on April 1, 1837; and \$100 annually thereafter until

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the whole sum be paid, with interest to be paid annually, etc.; and in consideration of the above payments being punctually made at the time and in the manner specified," the plaintiff agreed and bound himself, etc., "to convey by warranty deed to the defendants, the following described tract of land," etc. The suit seeks to recover the first two installments and interest upon the whole up to April 1, 1837. The defendants have pleaded *non est factum*, and appended a notice, that by the agreement the plaintiff sold them an in-lot in the town of Black River, which was the consideration of their \*covenants declared upon; that when [203 the covenants were made, the plat of said town had not been surveyed by the surveyor of the county or of any adjoining county, nor had a map thereof been made according to the laws of Ohio. The case was submitted upon an agreement that the facts set forth in the notice were true.

E. S. HAMLIN, for defendants. The policy of the law for recording town plats is opposed to any sale of lots, until a record of the plat is made. This sale is opposed to the scope of the law, and therefore can not be enforced. It makes no difference that the act contains no *express* prohibition to such sale. Com. on Con. 66; 1 Taunt. 135; 6 Ohio, 24; 1 Kent C. 437; 1 Am. C. L. 365, and cases cited; 2 Rose's Bank Cases, 351; Wright, 150, 749

No argument was submitted for the plaintiff.

By the Court, WOOD, J. Do the facts set forth in the notice annexed to the defendants' plea bar the plaintiff's action? Section 6 of the act referred to in the notice, 29 Ohio L. 350, provides that all proprietors of lots or grounds in any city or town corporate in this state, who have subdivided or laid out, or who shall subdivide and lay out the same in lots for sale, shall cause accurate and true maps or plats thereof to be made and recorded in the office of the recorder, in the county in which such town or city may be situated, etc.; and section 7 enacts, that if such proprietor shall sell any lot in any plan or subdivision of, or addition to, the lots originally laid out in said town, before a map of such subdivision or addition shall have been so recorded, he shall forfeit and pay to the state for the use of such town, the sum of fifty dollars, with costs for each lot sold, etc. It is argued for the defendants that the plaintiff can not recover upon this covenant, because it violates the act referred to, which is a penal statute. A question in strict

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analogy with this has been decided in England, which seems to the court to settle the present case. By the 29 George III, 68, it is enacted that every person who shall deal in tobacco, shall, before he shall deal therein, take out a license, and renew the same annually, under a penalty of fifty pounds. Suit was brought to recover the value of certain tobacco sold by the plaintiff, who had no license. The defense was that his want of license vitiated the contract of purchase, but the court held, that inasmuch as the statute did not declare a sale made under such circumstances illegal, the sale, at most, was a violation of a mere revenue regulation, 203] \*protected by a specific penalty, and the plaintiff had judgment. 11 East, 180, 299. We think the facts set up in this case do not bar the plaintiff's action. Judgment for the plaintiff.

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THE TRUSTEES OF THE MCINTIRE POOR SCHOOL v. THE ZANESVILLE CANAL AND MANUFACTURING COMPANY ET AL.

A bequest for charitable uses, where the objects are sufficiently defined, and the person designated as trustee acquires a capacity to hold by subsequent act of incorporation, takes effect as an executory devise.

The modes by which a private corporation in our country is dissolved, are: 1. By the death of its members; 2. Surrender of its franchises; and 3. A judgment of forfeiture for non-user or abuse.

A legislative act reciting that a corporation trustee had lost its right, and authorizing a purchase, for the state, of its property, is a recognition of its existence as a corporation capable of contracting.

**BILL** in chancery. From Muskingum. The plaintiffs, Peter Mills and others, claiming to be the lawful trustees of a charitable fund, created by the will of John McIntire, bring this bill against the Zanesville Canal and Manufacturing Company, the executors of McIntire, and D. Young and wife, late the widow of McIntire, who hold or claim the estate, for an account. The case comes on upon a demurrer and answer of the canal company and of the executors of McIntire, and on a plea by the other defendants. Young and wife deny the validity of the bequest, and set up a right to the estate as heirs. The canal company and the ex-

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ecutors hold under the trust, and assert that its execution was committed to them by the will, and that it has been thus far faithfully administered.

In 1812, an act was passed to enable John McIntire and his associates to erect a dam over the Muskingum river. 10 Ohio L. 173. The preamble recites, as the objects, "that great advantages for water-works would be secured, and the navigation of the river improved." The law authorizes McIntire and his associates to construct the dam in certain specified forms, cut a canal, and build a lock adapted to the passage of boats; to collect tolls; to condemn any adjoining land which they may "find necessary for the purpose of making said canal, or any part thereof, the better to answer the objects of this act;" and it renders them liable to the suit of any person injured by their neglect.

\*In 1824, the association called the Zanesville Canal and [204 Manufacturing Company was formed under this act, with provision for a capital of \$250,000, divided into shares of \$500 each, and prescribing the manner of conducting the business of the company: one hundred and eighty-six shares of stock were subscribed, of which eighty-eight were held by McIntire in his own right. The company was organized under these articles of association; officers were appointed, and business commenced and continued, to improve the navigation of the Muskingum river between Dresden and its mouth. By section 27 of the act of incorporation, the time for the company to complete their dam, lock, and canal was extended until February 11, 1835, and upon their failure, within this extended period, the Muskingum Navigation Company were authorized to finish, take possession of the work, and hold it until the money expended, and the interest accruing upon it, with ten per cent. in addition, should be repaid from its profits. The dam, lock, and canal were not completed within the time extended by the last-cited section; and such forfeiture was incurred, by this failure, as it was intended to impose. On February 19, 1835, a law was passed "authorizing the canal commissioners to take possession of certain property for the use of the state." 33 Ohio L. L. 90. After reciting that the Zanesville Canal and Manufacturing Company had lost its rights to construct the canal and locks, by non-execution within time, it provides for the purchase from them of the real estate necessary for the dam, canal, and the profitable use of the water, by the state, and for the ratification of existing laws. In the event of inability



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to make the purchase, it authorizes the canal commissioners to enter and take possession of the land necessary for the canal, locks, dam, and profitable use of the water power.

In March, 1836, an act was passed by the legislature of Ohio, "to incorporate the McIntire Poor School." After reciting that property had been devised for this purpose, to be managed by the Zanesville Canal and Manufacturing Company, as trustees, and that it had been represented that that company had ceased to exist, so that no persons are competent to execute the trusts, it creates a corporation of five trustees, and confers the necessary powers to carry the devise into effect: "Provided, that nothing contained in this act shall be so construed as to affect the private or corporate rights of any person or persons, or change the will of the said John McIntire; but, on the contrary, to carry into effect the true intent and meaning thereof."

The Zanesville Canal and Manufacturing Company organized 205] \*under the articles of 1812, and, accepting the charter of 1816, has in fact continued an organized and existing corporation until this time, managing its own and the McIntire property, and exercising its corporate functions.

The plaintiffs are the corporation created by the act of 1836, and they bring this bill as well against the Zanesville Canal and Manufacturing Company as against the executors and the heirs of McIntire, to ascertain and declare the trust, and to carry it into effect. A demurrer to the bill having been overruled, the case stands for hearing in this court upon the demurrer of the Zanesville Canal and Manufacturing Company and of the executors of McIntire, contesting the plaintiff's right to the account, upon answers by the same showing the due performance of duties, and furnishing the materials for an account, if the property is demandable by these plaintiffs, and upon the plea of Young and wife, denying the validity of the trust, and claiming the property as heirs of McIntire.

C. B. GODDARD and C. C. CONVERS, for the Zanesville Canal and Manufacturing Company and the executors of McIntire: I. As to the demurrer. On this posture of the case the first inquiry proper to be made is, what are the facts before the court? In addition to the facts alleged in the bill, there are:

1. The act of February 24, 1816, to incorporate the Zanesville Canal and Manufacturing Company, which is "declared a *public*

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*act*, to be construed in all the courts and places, benignly and favorably;" and therefore all its enactments are to be noticed by the court without being specially pleaded. *Beatty v. Knowler's Lessee*, 4 Pet. 152, 167.

2. The act of February 21, 1812, to enable McIntire and associates to erect a dam across the Muskingum river. Section 1 of the act to incorporate the company refers to this act, and recites its title at length; it thereby makes it a *public* act, which the court will notice judicially.

3. The facts that McIntire had organized a company for the purpose of carrying into effect the act of February 21, 1812; that he called *that* company the Zanesville Canal and Manufacturing Company, are shown by the same section 1 of the act incorporating the company. Section 11 of the same act shows that McIntire was an original subscriber and stockholder in this company, to the amount of seventy shares.

4. The several acts supplementary to the act incorporating the \*company; being the acts passed January 17, 1817, 15 Ohio [306 Stat. 35; December 30, 1817, 16 Ohio Stat. 35; January 27, 1823, 21 Ohio Stat. 53; February 11, 1828, 26 Ohio Stat. 47; and February 19, 1835, 33 Ohio Stat. 90, assume, of course, the character of the principal act, which they follow, and become parts of it, and are therefore *public* acts.

It appears from the will that the Zanesville Canal and Manufacturing Company, designated in it, is the company of that name, in which the *testator owned stock*; and that, section 11 of the company's charter shows, was the company associated to carry into effect the act of February 21, 1812. Section 18 of the charter recognizes the old company, which has a corporate capacity conferred upon it by that act, as the same company designated by McIntire.

The case, then, upon these facts shows that McIntire, while he was a member of the Zanesville Canal and Manufacturing Company, which he himself had organized under the express authority of the legislature for objects as well of public concernment as of individual enterprise, made his will, by which he directed the whole of his estate to be ultimately vested in stock of that company, and the dividends thereon, upon the happening of the contingency specified in the will, to be applied to the support of a school for poor children, to be established in the town of Zanes-

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ville, by the officers of that company, who were directed to select the children from within certain limits, well defined and established. That the legislature, not calling in question the validity of this appointment, but, on the contrary, treating it as well made, afterward, by express and positive grant, vest in the same company, as incorporated, all the rights, titles, and privileges with which McIntire, in his will, had declared that *that* company should be invested. Unless the legislature had thus recognized and confirmed to the company the *original* appointment (which the company then and always asserted to be a *valid* trust), in the full and ample manner in which it is recognized and confirmed by section 18. of the act of incorporation, it is not to be presumed that the company would have accepted the charter, at the expense of abandoning that trust confided to their integrity, by their deceased companion and associate, in the execution of which, by them, in the very manner pointed out by himself, as they well knew, he had felt and expressed the liveliest interest.

The amendatory acts above referred to, show that the charter was accepted and acted under by the company. 1 Charl. 151.

The period for which the corporation was created has not yet 207] \*expired. It must be presumed, therefore, in law, that it still continues to exist. Neither the corporate existence, nor any of the franchises, can be made to cease, or be impaired, during the period for which the charter is granted, except by judicial proceedings, instituted directly against the company, charging a forfeiture and a judgment therein by a court of competent jurisdiction against the corporation. 6 B. C. 703; 13 Eng. C. L. 301; 5 Johns. Ch. 366, 379; 6 Cow. 23; 1 Hall, 191; 1 Paige's Ch. 102; 7 Conn. 30, 46; 9 Conn. 536, 554; 4 Gill & Johns. 1; 3 Rand. 136, 142; 16 Serg. & Rawle, 140; 1 Blackf. (Ind.) 267; 9 Cranch, 42; 7 Ohio, 82, pt. 2; 8 Ohio, 548, 552; 1 Charl. (Geo.) 250.

The bill contains no averment of any *judgment of forfeiture* against the company; nor does it even aver that the company "*has ceased to exist*"—it therefore fails to show that state of facts, upon the existence of which alone the legislature designed the act of March 14, 1836, to have any effect; the authorities already cited show that the company continue to exist. The case of Ohio, ex rel. etc., v. Brice, 7 Ohio, 82, pt. 2, is directly in point to show that an appointment by the legislature of a trustee to fill an office alleged to have become vacant by forfeiture, before a *judicial*

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*finding* of the forfeiture is *void*; and this, too, in a case where the legislature possess the undoubted right of appointment.

But the defendants contend that they have forfeited nothing by their failure to complete the canal and locks, except their right to construct these works, and the consequent benefit of the tolls arising from the same.

The charter, by section 1, conferred three classes of privileges: 1. It incorporated the stockholders to do all things required of McIntire and his associates, by the act of February 21, 1812; to establish water-works, etc. 2. It granted banking privileges. 3. It conferred the right to do and execute what "it should be expedient or proper to do, subject to the rules, regulations, limitations, restrictions, and provisions thereafter prescribed;" among the "provisions thereafter prescribed," was the provision of section 18, authorizing and requiring the company to act as trustees under McIntire's will. These three classes of privileges were distinct and independent. One might be forfeited without affecting either of the others. A cause which would work a forfeiture of the right to construct the works, would have no necessary connection with the banking franchises; nor, on the other hand, would a cause of forfeiture, arising out of the banking operations, affect the right to construct the works; much less would a [208] forfeiture of either, or both, of the first two classes, affect the franchise of acting as trustees under McIntire's will. No franchise would be lost or impaired, by any cause of forfeiture, unless it were connected with, or dependent upon, the subject matter out of which the cause of forfeiture sprung. The *trust* franchise could not, therefore, be lost or impaired by the forfeiture of any other privilege granted by the charter, wholly unconnected with it. A forfeiture of a part of the franchises of a corporation, does not operate as a forfeiture of all, unless they are so blended as to be incapable of being separated. Much less would forfeiture to part only of its privileges, operate to destroy the *existence* of the corporation.

But the several acts of the legislature show a waiver by the legislature of all forfeitures (if any had accrued), which would constitute a good defense, even in a *quo warranto* against the company.

Upon February 11, 1835 (the day on which it is claimed the forfeiture of the corporate existence of the company occurred), the

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state might, by proper judicial proceedings, instituted for the purpose, have reclaimed the franchises then forfeited. The right of the state must be asserted by judicial proceedings in the proper tribunal. The legislature could not exercise this judicial function of determining the forfeiture. *Merril v. Sherburn*, 1 N. H. 99. The opinion of the court in this case is a long and able one, and we commend it to the careful consideration of the court.

But the state might, instead of enforcing, elect to *waive* the forfeiture; and the defendants contend all forfeiture has been waived by the state, as is shown by the act of February 19, 1835. By that act (passed *after* the pretended forfeiture occurred) the legislature authorize and require the canal commissioners "*to contract with and purchase from the Zanesville Canal and Manufacturing Company such real estate belonging to said company.*" etc. Sec. 1. Section 3 provided that the leases *then* held by the company, should, on the *purchase* being made, be *transferred* to the commissioners. These provisions show that the legislature *then* considered the corporation in being, capable of *being contracted with*, and directed their agents to *purchase* from the company a part of their lands.

Here, then, we have a legislative recognition of the continued existence of the company, and of its corporate powers and franchises. The case of the *People v. Manhattan Co.*, 9 Wend. 379, 380, is full to the point, that, if even the *entire charter* had been forfeited, before the passage of the last-mentioned act, the legislative 209] \*recognition therein contained of the continued existence of the corporation, amounts to a waiver by the state of all forfeitures which might, before that time, have accrued—and constitutes a complete bar to a *quo warranto*. In that case (which was a *quo warranto*) the corporation were allowed, by their original act of 1799, the period of ten years for the completion of the work required of them. In 1803, the time was extended for ten years more; which, of course, expired in 1818. The court say, if the act were not complied with then (that is, in 1818), it could not be at all. The forfeiture, or *the right of the state to enforce the forfeiture*, was then complete; and the corporation having since, in solemn and formal acts of the legislature, been recognized in repeated instances, the state must now be taken to have waived the forfeiture. The same principle is sustained in *North Hempstead v. Hempstead*, 2 Wend. 109.

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The complainants must, therefore, fail on the demurrer. They assert a right, under their pretended act, but wholly fail to make good the representations, upon the faith of which alone the alleged right was acquired. As all the enactments of the act of March 14, 1836, depend upon the preamble, and profess to be only justified by the facts there stated, it would seem that when it appears that the general assembly were imposed upon, or mistaken, as to the main fact, all the enactments based upon it would fall to the ground. No other rule is safe in a country where private statutes are continually passed, based upon representations, the truth of which the legislature does not, and in most instances can not know. It is for the court to determine, upon a claim set up under the private act, whether that state of facts existed, upon which the legislature predicated the act. *Le Clerc v. Gallipolis*, 7 Ohio, 221, pt. 1.

Look, then, for a moment, at this preamble. After reciting that McIntire had devised his estate for the support of a school, it proceeds with the admission that he, "by his *will*, appointed the president and directors of the Zanesville Canal and Manufacturing Company as trustees thereof;" and then sets forth (not that the company *has* ceased to exist), but that "it has been *represented* to the general assembly that the said canal and manufacturing company *has ceased to exist*, by that, or any other corporate name; *by means whereof*, no person or persons, or body corporate, are *now* competent to perform and execute the duty and exercise the authority required of said company as trustees as aforesaid, and to carry into effect the said devise, according to the true intent and meaning of the testator." "Therefore," "be it enacted," etc.

\*This preamble shows that the company *once* existed; otherwise it could not be said to "have *ceased* to exist;" and that it was *once* competent to exercise the authority required of said company as trustees; otherwise it could not be said that *by means of the company ceasing "to exist,"* "no person or persons, or body corporate, was *now* competent to perform the duty and exercise the authority required of them as trustees." It also recognizes both the validity of the *original* appointment and the *confirmation* of that appointment, by section 18 of the charter of this "body corporate," for it expressly declares that McIntire, "by his *will*, appointed the president and directors of the Zanesville Canal and Manufacturing Company trustees," and that said company was "*required*" to

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execute the duty and exercise the authority as trustees. How "required?" Why, by section 18 of their charter.

Can it be supposed that the legislature would ever have passed the act of March 14, 1836, except upon the belief that all the facts represented to them were true? Would they have passed the law if they had believed that all these representations, upon which their interposition was invoked, were *false*? The rights vested in the company by section 18 of their charter, can not be taken away, or impaired by any legislative enactment. We refer to the following cases—and first to the case of Dartmouth College v. Woodward, 4 Wheat. 518; second, to Allen v. McKean, 1 Sumn. U. S. C. 276, a case decided in May, 1833, in the United States circuit court for the district of Maine, which involved the constitutionality of an act of the legislature of the State of Maine, in reference to Bowdoin College. In delivering the opinion of the court, Mr. Justice Story says, the "founder of the college had a right and interest in having the funds perpetually applied to the objects of the institution. As founder, he was entitled to the visitatorial power over the college, and having delegated that power to certain trustees and overseers in perpetual succession, as his chosen substituted agents and visitors, he has also a right and interest in having that power perpetually exercised, *by the very bodies and by none other*, which he has constituted for this purpose. Nothing is clearer in point of law than the right of the founder to have his visitatorial power exclusively exercised *by the very functionaries* in whom he has vested it. It is the very *substratum* of his donation. Id. 305. This is not all; the founder has a right to have the statutes of his foundation, as to the powers of the trustees, strictly adhered to, unless so far as he has consented to any alteration of them. Again he says, "it would hardly be consistent \*that the legislature possessed a right to *substitute itself*, in the management of the college and its interest, for the *charter boards*; and if not, how can it confer such an authority upon other persons?" Id. 312.

We now ask the attention of the court to a case decided by the Supreme Court of the State of Maine, in April, 1834—Trustees of New Gloucester School Fund v. William Bradbury, 2 Fairfield, 118. This and the preceding case were less strong than the case now before the court, inasmuch, as in both cases, the government was the founder, and in this case the founder was a private individ-

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ual. In other respects the case from Fairfield's Reports is almost exactly similar to that which we are now discussing; so much so, indeed, that we are almost led to believe that the framer of the act of March 14, 1836, borrowed his ideas and much of his language from the very statute which the Supreme Court of Maine declared to be unconstitutional. If the case is regarded as authority, it is perfectly conclusive in the case now before the court. The language of Judge Hitchcock, in delivering the opinion of the court in the case of the State of Ohio v. Commercial Bank of Cincinnati, 7 Ohio, 126, 131, pt. 1, illustrates and enforces the same great constitutional principle. See also 4 Gill and Johns. 1, in which the same doctrine is fully discussed. Among other positions established by the preceding cases is this, that the office of a trustee of a school, or college, with or without compensation, is a valuable office and franchise, of which the legislature can not rightfully deprive any person or body corporate. See also 6 Conn. 532; 7 Ohio, 82, pt. 2.

Upon a former argument of this case, the counsel for the complainants insisted that the act of 1836 was designed merely to incorporate the *cestuis que trust*, and enable them to call the lawful trustees to an account. To incorporate the *cestuis que trust*! Why, who ever before heard that Peter Mills, John A. Turner, and their confederates were "*the poor children of the town of Zanesville?*" No such thing. The act does not incorporate, was not designed "to incorporate the trust." It does nothing more than incorporate strangers, who are now shown to be mere intermeddlers. 1 Sumner, 301. This view of the case must have occurred to the counsel, not only after the passage of the act, but even after the filing of the bill. It is utterly inconsistent with the objects set forth in the preamble and every enactment in the statute. An authority to call the lawful trustees to an account, does not require that the persons upon whom such an authority is conferred should be substituted, for the lawful trustees \*should be invested with all [212] their property, all their powers, and all their rights, nor that they should have power to receive donations from other sources. Besides, it was not necessary for the legislative power to be invoked for so small a purpose. "*Nec deus intersit, nisi dignus vindice nodus.*" Ample remedies existed before. Where *cestuis que trust* are numerous, a part may file a bill for themselves and others. Manning v. Thesiger, 1 Sim. & Stu. 106; 2 Sim. & Stu. 67; Story's



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Eq. Pl. 97, 115, 117. The infancy of the *cestuis que trust* did not render the legislative interference necessary, for a *prochein ami* could be appointed; their poverty could present no obstacle, for the *philanthropy* which prompted the statute of 1836, would doubtless have been exercised on behalf of the poor children of the town of Zanesville in any form in which it could have been made available. If these complainants have a right to call for an account at all, it is merely incident to the great powers with which the act of 1836 vests them. No express authority is given them by that act to call the canal company or the executor of McIntire to an account. It is therefore incidental only, and if the principal fall, all the incidents fall with it. This was unquestionably the view taken by the counsel who wrote the bill. Its whole scope and design, its every allegation and prayer, are at variance with the lame afterthought on which it is now attempted to maintain this case. Mit. Pl. 39, 67, new ed.; 5 Sch. & Lef. 9; 2 Ves. Sen. 299; 2 Atk. 141.

But if the legislature intended by the act of March, 1836, to give the complainants any such power of calling to account, except as incident to the greater power of taking the property, they two years afterward changed their views and gave all this power to the superintendent of common schools and the prosecuting attorney. See section 43 of the common school law, passed March, 1838, 36 Ohio L. 35, 36, where ample provision is made for calling trustees to account, and under which the defendants have been called upon by the superintendent to account and report to him.

It was claimed by the counsel for the complainants (who framed the bill) in the court below, that the company had lost its existence by the failure to complete the canal and locks by February 1, 1845; that the forfeiture became *ipso facto* complete on that day, without any judicial proceedings against the company; that there were then no trustees to take charge of the charity, and that therefore it was proper for the legislature to step in and supply 213] the vacancy. He did not call in question the validity of the original appointment, nor of the legislative appointment contained in section 18 of the company's charter. This was reserved for his associate counsel, who on the same occasion asserted that the original appointment being of officers of an unincorporated company, was void; and that, as section 18 conferred on the company only the same powers granted by the will, that section conferred no

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rights; and that the state, exercising the high prerogative right of *parens patriæ*, could seize the charity and administer it in its own way. But can it be doubted that the legislature, when it granted the charter, contemplated giving to the trustees of McIntire's *own choice* a corporate capacity, and to do all in the power of the legislature toward promoting his munificent design. Even if the high, illimitable, transcendent power of *parens patriæ* has been transplanted to our soil; if the flowers of kingly prerogative unfold themselves from our republican stock, surely that power has expended itself in the present case, by the full, broad, comprehensive grant to this company of "all the powers, rights, titles, and privileges invested by the last will and testament of the said John McIntire in said company."

Does not the legislature show, by this very provision of section 18, that it then considered the original appointment valid; that it was then disposed to sustain it, if in its power to do so, and to promote the benevolent designs of the testator, by investing the trustees of *his own choice*, with the privileges and immunities of a corporate character and the conveniences and advantages of corporate action? It would not *then* violate the known wishes and declared intention of the testator as to the persons who should be the almoners of his bounty; for the *mode* in which it was to be dispensed, they doubtless regarded, in the emphatic language of Justice Story, "*as the very substratum of the gift.*" It is not, therefore, to be presumed, that the legislature would have passed the act of March 14, 1836, except for the gross misrepresentation upon which, as already shown, its enactment was procured.

The course of the complainants, and their anxiety to carry the benevolent devise of McIntire into effect, *in their own way*, have started the question whether the bequest is valid. Two of the defendants, for whom we do not appear, assert that the bequest is void, and that they are entitled, as heirs at law of McIntire, to all the property. We contend that the devise is valid, and that the original appointment by the will was a good one. And this becomes a most grave and important question, since the intimation of the Supreme Court of the United States, in the case of the Baptist Association v. \*Hart's Ex'rs, 4 Wheat. 1, that [214 the prerogative right of *parens patriæ* does not exist in the United States. For then, if the original appointment can not be sustained, the charity is gone forever. At the death of McIntire, this

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company was associated for the purpose of manufacturing and banking—the power to bank, before the act of incorporation, being recognized by acts of the general assembly. 2 Chase's Stat. 868, 904. By his will he directs his executors to invest the proceeds of all his property in the stock of this company. Of the profits of this stock, his executors were to receive from the company one-half, to be by them paid over to the widow—the other half was to be paid, by the president and directors, to the daughter of the testator. Thus far the provisions of the will are such, that the intention of the testator may be carried into full effect, without violating any rule of law. A testator may direct that the survivors of a firm, of which he was a member, shall carry on the business after his death. Col. on Part. 120, 121; 7 Pet. 586. If so, why not likewise direct what disposition shall be made of the profits, to which his interest in the concern may be entitled? The direction that the company should pay the half to Amelia McIntire, was as good as that the executors should receive the other half. And even if the will had stopped, after directing the investment, the executors would, by law, in the absence of all directions to that effect, be entitled to receive the dividends for the purposes directed by the testator. There was no legal impediment in the way of the agents of the company—the active partners—the *president and directors*, paying over the dividend to the executors, or legatee, as directed by the will. Immediately on the death of McIntire, the company became entitled to require that the investments should be made as directed by the will, and to hold and retain the half directed to be paid to the daughter, until she should personally apply for it. In principle there can be no difference between the testator directing the company to pay the dividends to his *daughter*, and directing them to pay the same for the *support of a school*, unless it arise from the *uncertainty of the objects* in the latter case. But that uncertainty is, in this case, entirely removed, by the power of selecting the objects of the charity being expressly vested in the company; a selection to be made from a certain class, within certain limits, known and established by law—the limits of the town of Zanesville. *Id certum est, quod certum reddi potest*. Without this power of selection, the charity could not be sustained. A case reported in 4 Dana (Ky.), 355, 356, was decided, by the court of appeals of Kentucky, as late as the fall of 1836,

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and is strikingly \*analogous to the present case, in the pro- [215  
visions of the will.

The court sustained the charity on the ground that it was a valid trust, and could be sustained in equity; holding at the same time, that although that state had adopted, while connected with Virginia, the statute of Elizabeth, and never repealed its provisions (having separated from Virginia before its repeal by that state), the court did "not admit that the commonwealth, as *parens patriæ*, can rightfully interfere, unless there be an escheat to her." The court say, "rights here *are regulated by law*, and if any person have a claim to property, ineffectually dedicated to charity, the commonwealth has *no prerogative* right to decide on that claim, and dispose of the property as the king of England has been permitted to do"—pp. 365, 366. "The prerogative cases in England are not *judicial*. We are satisfied that the *cy pres* doctrine of England is not, or should not, be a *judicial* doctrine, except in one kind of cases; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful, or suitable, and will effectuate the *declared intention* of the donor, and *not* arbitrarily, and in the dark, *presuming* on motives or wishes, *declare an object for him*. A court may act judicially as long as it *effectuates* the lawful intention of the donor"—p. 366. "Yet this case is of that class over which the court of equity may take cognizance, and in which such court, acting judicially, may act effectually in upholding and promoting the bounty of the testator, according to *his declared and unambiguous intention*, and *without violating any rule of law, principle of justice, or dictate of public policy*"—pp. 366, 367. We beg to refer the court to the whole opinion of the distinguished chief justice in this case: for if it be considered as law by this court) and the reasoning is, to our minds, irresistible), it decides the case now before the court; sustains the original appointment; declares that the regal prerogative, and other curative powers inherent in the crown of England, have never taken root in this country; that the court can, by virtue of its judicial powers, uphold and promote the bounty of the testator, and give effect to his intentions, *in the very manner pointed out by the will, and through the trustees chosen by*

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*himself*: so that if no charter had ever been granted to the company, they might well execute the trust.

In support of the validity of the devise we rely on the following authorities: 3 Ohio, 498, 502; Amb. 524; 12 Mass. 537; 16 Pick. 107; 7 Vt. 241; 3 Pot. 101.

216] \*The court will observe that the charitable devise could not, and did not, take effect until the death of Amelia McIntire, in 1820, prior to which time the company was incorporated, and had full capacity to take. The following language of Thompson, Justice, in the case last cited, 3 Pot. 143, 144, seems directly in point: "It is in general true, that where there is a present, immediate devise, there must exist a competent devisee and a present capacity to take. But it is equally true, that if there exists the least circumstance, from which to collect the testator's contemplation, or intention, of anything else than an immediate devise, to take effect *in presenti*, then, if confined within legal limitation, it is good as an executory devise." It is true, that the court in Massachusetts, in the case in 16 Pick. 107, above cited, held that the statute of 43 Elizabeth, cap. 4, is in force in that state, and the reasoning of the court would go to show that that statute is in force here. But, be this as it may, the case of *Inglis v. Trustees of the Sailors' Snug Harbor*, in 3 Pot. 101, is decided upon grounds wholly independent of that statute, and is amply sufficient to sustain the present devise, and to vest the execution of the trust in the Zanesville Canal and Manufacturing Company. In this view of the case, we ask that the demurrer be sustained, and that the complainants' bill be dismissed.

2. But as the only reason for filing the demurrer was to save the expense of answers, and that expense has now been incurred, in consequence of the decision of the common pleas upon the demurrer, and the order of this court dismissing the appeal from that decision, it has now become a matter of indifference to us, whether the court consider the case upon the demurrer, or upon the answers alone. Upon the case standing upon the answers, we only refer the court to the answers themselves. They deny most positively and explicitly every allegation and every charge, impeaching, in any degree, their integrity, or fidelity, in the execution of the trusts confided to them, and show that the charity has been honestly, faithfully, and prudently administered. They show that the company still exist, in the full exercise and enjoyment of all

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their privileges and franchises, untouched and unimpaired—in the faithful discharge of all their duties as trustees of McIntire's bequest—selecting the objects of his charity, and dispensing his bounty through the almoners of his own choice, and in all things faithfully discharging the high and responsible, although vexatious and troublesome duties of their trust. They have taken upon themselves to establish the school under the will, although the widow of the testator is still living, and \*it may be doubted, [217 whether they are authorized by the will to establish it, until after the death of both the widow and the daughter; for before the decease of both, "ALL the profits, rents, and issues of the stock" can not, as directed by the will, be applied to the establishment of the school.

Upon the whole case we ask that the complainants' bill be dismissed, with costs. John McIntire, in his lifetime, was the master of his own property. He had a right to make a will, giving it to whom he pleased. He bestowed it in charity, and he selected his own friends and associates as the administrators of that charity. The proposition is a monstrous one—it borders on moral forgery—that all his wishes, in this respect, should be disregarded; that a new will should now, after his death, be made for him by strangers, whom he knew not, to whom he was not known; that the management of his estate should pass from the hands, of those to whom he specially confided it, in whose judgment and integrity he had entire confidence, and be consigned to the keeping of those whom he did not select, whose future intermeddling with his estate, could he have foreseen it, might, as it most assuredly would, have prevented this munificent bequest altogether. "*Elemosynæ ad mentem donatoris præcipue servandæ.*"

T. EWING, for Young and wife, who make defense by plea:

We contend that the devise of the trust estate, sought to be enforced by this bill, is void. 1. Because there is no trustee whom equity can recognize; and, 2. Because the *cestuis que trust* are uncertain, and no mode is pointed out by the will whereby they can be legally designated. The Zanesville Canal and Manufacturing Company being an unincorporated association of individuals, the members of which were continually changing, was incapable of receiving or executing a permanent trust. A trustee must be a person certain—one who can be called to an account by a court of equity, and compelled to execute the trust specifically, or ac-

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count for its breach. By the terms of this will the president and directors of this unincorporated company are to apply annually, *forever*, the proceeds of the estate to the use and support of a free school. They are *forever* to select and fix upon the objects of the testator's bounty, and as there is no devise over, and no mode designated by which any part of the trust that, by any chance, they may leave unexecuted, is to be taken up and performed, they can not enter upon the execution unless, in contemplation of 218] law, they can perform it to \*the last. It is true, it is not the company, but the president and directors of it, that are named as trustees; but this, instead of obviating the difficulty, makes it, if possible, the greater. The company, as a company, are in no-wise concerned in the execution of this trust, and in nowise bound for its faithful performance. It is a duty thrown upon the president and directors, whosoever they may be, by virtue of their situation or office in said company, and whenever a director is removed and another appointed, the trust is in like manner transferred. This is the language, and this the manifest intent and purpose of the will. Now, the president and directors of that company had no being, as recognized by law. They could have no *heirs* and no *successors*. The individuals who should follow those who had gone before them in the execution of that trust (supposing it to vest) would be in no respect responsible for the acts of their predecessors, and those who had ceased to be directors could not be held liable, as individuals, for what had been done in their *pseudo*-official capacity. The trust, therefore, could not be assumed or executed by the president and directors of this company; and by the will, those who were directors at the time of the testator's death, could not receive the trust in their individual capacity. The language of the will is clear, distinct, and intelligible in this, if in nothing else. Whatever trust is attempted to be conferred is upon the *officers of the company as such*, and not upon the individuals who may chance to be such officers at the time of the testator's death. "The president and directors of the company are annually, *forever*, to appropriate all the profits, rents, and issues of my stock as aforesaid, and all my estate of whatever kind the same may be, to the use and support of a poor school," etc. It is not the *individuals* who may be president and directors, and their heirs, that the testator has attempted to clothe with this trust *forever*, but the officers of this company, whom he

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erroneously supposed could have perpetual succession. The clause in the will next preceding this devise, and connected with it, is further proof of the intent to vest the trust in the president and directors of the company, as an association. It is in these words: "But should my daughter, Amelia McIntire, die without an heir or heirs of her body, then my house and lot, with the premises, etc., is to be held in fee simple by the company before described, for the use and occupancy of the president of said company, he paying into the fund aforesaid, for the use hereafter described, a reasonable rent, to be fixed by the directors for the same; and the president and directors of the said company are annually and forever to appropriate," etc.

\*This company shall have the house *in fee*, that is *forever*, [219 for the use and occupancy of their president. He shall pay therefor an annual sum, to be fixed by the directors—all looking to perpetuity—and the rent so assessed and received is to be paid into the fund, which fund, made up in part of the rents, but chiefly of the issues and profits of his stock, is to be applied *annually, forever*, by the president and directors of the company, to the use and support of a poor school. If, by the terms of the will, the trust were to have vested in their officers for a limited time only, and if a mode had been provided by the will for the creation or for the coming into existence of a future trustee, in whom the trust might vest, this difficulty would have been obviated, and it might have been held (though not without violence to the language of the will) that the title of president and directors was a mere designation of the persons who were to take, the trust might have passed to a future devisee capable of taking it as an executory devise. It is a question to the court, as a matter of construction of the will itself, to find in whom and how the language of the will, admitting it to be effective, as expressed, does vest this trust. The question must be tried upon precisely the same principles; the *fact* and *truth* must be applied to or elicited from the paper in just the same manner as if the president and directors named were a body corporate, capable of taking, and the contest were between those who are now directors and those who were directors at the time the devise took effect, but who claimed to hold the trust as individuals. The question is: What is the *truth* of the *matter* in *fact* and in *law*—not, as has sometimes been supposed, what means are there of *evading the*



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*truth?* If the president and directors had, at the time of the devise, been a body corporate, having perpetual succession, and capable of taking under this devise, who could for a moment contend that it was not to *them*, in their corporate or aggregate capacity, but to them *individually*, that this trust *forever* was given? Thus, it appears to me, stands the question or principle, and so are the authorities. In *Baptist Association v. Hart's Ex'rs*, 4 Wheat. 28, Chief Justice Marshall says: "Can the bequest be taken by the individuals who composed the association at the death of the testator? The court is clearly of opinion that it can not. No private advantage is intended for them. Nothing was intended to pass to them but the *trust*, and *that* they are not authorized to execute as individuals. It is the association *forever*, and not the individuals who, at the time of his death, might compose the association, and their representatives, who are to manage the perpetual fund."

220] \*In *Greene v. Dennis*, 6 Conn. 292, the devise was in these words: "I give to the yearly meeting of the people called Quakers, of New England, my farm in Pomfret, that I bought of Clark and Nightingale, the net income of which is to be appropriated in aid of the charitable fund of the boarding-school established by Friends in Providence; to them, the said people called Quakers, and their successors in faith, forever." In giving the opinion of the court on this devise, Ch. J. Hosmer says, page 300: "Two positions, in my opinion, are indisputably certain. The first is, that it was the intention of the testator to devise the estate in question to the *yearly* meeting, and not to the individuals composing it. Hence, it is given to this assemblage '*and to their successors.*' Perhaps this distinction is unimportant, for whether the devise was to the *yearly meeting* or to the members constituting it, the legal result will be the same. The devise, in either event, was not to any certain individuals, but to the members of an assembly meeting together annually, and to such other members of this variable body, in endless succession, as should by delegation compose it. There was no antecedent certainty that those who were the members of the yearly meeting, at the death of the deviser, would continue such a single year. But, in all probability, there would be an annual change of at least part of the members, and beyond all doubt, at no distant period, they would be all swept away from the stage of action. And what decisively shows

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the devisor's intention, anticipating this fluctuation, he provides for the performance of the trust by designating the *successors* of the yearly meeting, and treating that body as if it were a corporation. It is obviously opposed to the intention of the devisor to construe the devise as vesting an estate in the individuals of the *yearly meeting*, being members of it at his death, and then continue the estate in them after they had ceased to be members. The words of the devisor give the property to the members of the *yearly meeting and their successors*—unquestionably intending that none but members should have any part in it, and the nature of the case speaks the same language. It was the testator's object to execute a perpetual trust; and this he would have done if the *yearly meeting* was a corporation, capable of becoming trustees of the estate devised. But if the individuals existing at his death, and being members of the meeting, were invested with the land devised in fee simple, what would become of the trust on their ceasing to be members? Scattered over a wide extent of country, without any necessary conventional meeting, their duty as trustees they would be incapable of performing. This is [221 the most favorable view of the subject. Soon by death some of the individuals would leave no heirs; others would leave numerous *minor children*. The number of trustees would increase astonishingly, and the difficulties would every moment thicken, and become more and more insuperable.

"The second position alluded to is, that the testator's *intention* is repugnant to the rules and principles of law. This point is too clear to require discussion. A corporation alone, authorized by the sovereign power, and vested with perpetual succession, is capable of fulfilling the testator's intention" (p. 301).

This conforms to the well-known and well-settled principles of law, never departed from, except in a few cases, where the object was specially favored by the courts.

Mr. Justice Story, in his dissenting opinion in the case of *Inglis v. The Sailors' Snug Harbor*, 3 Pet. 146, says, with great force and truth: "The court is to look into the terms of the will, and to construe it according to the intention of the testator; that intention has been justly said to constitute the pole star to guide courts in the exposition of wills; where the intention is once fairly ascertained, it is wholly immaterial that it can not be car-

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ried into effect by the principles of law, for our duty is to *interpret*, not to *make* wills for testators."

I take it, then, as established in the first step of this investigation, that the devise was to the president and directors of this unincorporated association. Whosoever might from time to time, compose such association, or be their officers, *they* were the trustees; *they* were clothed with power, not only to execute the trust, but to select the objects of the testator's bounty; and the devise is on general principles invalid, if it depend on their capacity to receive it. Pressed by the strong necessity imposed on them by the explicit terms of this clause of the will, the counsel of the Zanesville Canal and Manufacturing Company attempt to support this devise, as a trust, or duty, devolved by the will on the "*agents* of the company—the *active partners*—the *president and directors*," that (the investments being made pursuant to the directions of the will) they should pay over, one-half the profits of the stock to the executors, one-half to Amelia McIntire, during her life. "And in principle," say they, "there can be no difference between the testator directing the company to pay the dividends to *his daughter*, and directing them to pay it *in support of a school*."

This view of the matter tends only to confuse; it ingeniously 222] obscures \*the question, but it does not at all explain it; much of the property of the testator was in truth, at the time of his death, vested in the stock of this company, and the proceeds of this investment was in part the subject of this devise; but how did that situation of the property render partners in that association, whether *active* or *passive*, *agents* or *directors*, more capable of receiving, or executing a trust, *forever*, in the character of partners or agents? If they were at all capable of either, it is no matter where the fund comes from that is to be placed in their hands as trustees. It is not their capacity to *receive*, or to *sue for and collect*, that is alone in question; for if they can *hold the trust fund*, it being in their hands, and can *execute the trust*, their capacity is sufficient, and they can *sue for and collect*, as a necessary incident to those powers; nor is it by virtue of any directions to *them*, or trust conferred on them in the will, that they must pay the money, the profits of the stock, to Amelia McIntire, during her life; but it is by virtue of the devise to *her* and *for her benefit*. This devise gave *them* no rights, but vesting the profits of the stock directly in *her*, it declares further, that the dividend shall be

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paid to *her*, and not to pass through the hands of the executors. It is not necessary to inquire how far this provision in the will could be sustained by law; or what would be the consequence following the death of one partner in a firm, or association, when there is no provision in the articles for admitting the executors or devisees of the deceased partner to unite in carrying on the business of the firm. It is very certain that the surviving partners could not, even though the will should direct it, *compel* an investment of the funds of the decedent in their joint stock; for such provisions not being made pursuant to *articles with them*, nor for their benefit, but for the benefit of the heir or legatees, the latter alone have the option to compel the executors to attempt the investment, and the surviving partners would be in nowise bound to admit the representatives of the decedent to subscribe or purchase stock, or join at all in conducting the business of the partnership. To this effect are the cases cited. Coll. P. 120, 121; 7 Pet. 586. But the determination of this question would by no means effect the case, for the partners, or any select part of them, can no more be trustees *forever* of a fund arising out of business carried on by themselves, than they could if it arose elsewhere. The law makes no difference as to the *origin* of the fund; and the fact that it arose out of profits made by *them*, of the property of the testator, would only furnish another cogent reason in *equity*, why they could not as trustees administer and apply it. \*It [223 would increase the difficulty of bringing them to an account in equity, as trustees, while the equitable superintendence would become the more necessary, because of the complex duties of the trustees, and the complex relation in which they would stand to the fund and the individuals for whose benefit it was intended. See also Year Bk. 30; 10 Coke, 266; Cro. Eliz. 363.

But the case, in this aspect of it, is crowded with impossibilities. The partnership, as counsel contend, is to be carried on for the benefit of the devisees; not for a series of years, a time of fixed duration, in which it is permitted to a testator to control the disposition of his property, but *forever*. The "*agents*" of the company, or its "*active partners*," or its "*president and directors*," are to be trustees of this part of the property, also, *forever*; and *they* are *forever* to select the objects of the trust. Cast out of view, for the present, the special law of *charities*, and upon the principles of law and equity, judging and deciding as between man and man, is

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there, I ask, a valid trust vested in those partners, the *president and directors*, and those who have taken or may take, by succession, the partnership fund, and the control or direction of that partnership?

It is clear, on authority as well as principle, that there is not; and, indeed, the English statute of charitable uses would avail nothing to the trustees named in the will. *They* could not clothe themselves with the trust, even under the statute; and if there was a good trustee, capable of receiving and executing the trust, it would be void on general principles, because the *cestui que trust* is uncertain.

And touching the *cestui que trust*, in the case of *Morris v. Bishop of Durham*, 9 Ves. 399, a case decided on general principles, because it did not come within the statute of Elizabeth. An estate was devised to the bishop, with directions to dispose of the ultimate residue, "to such objects of *benevolence and liberality* as he shall in his discretion most approve." On which the master of the rolls, whose opinion is afterward revised and confirmed, says: "That this is a trust, unless it be of a charitable nature, too indefinite to be executed by the court, has not been, and can not be denied. There can be no trust over which a court will not assume control, for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property which is the subject of the trust, is undisposed of, and the benefit of the trust must result to those to whom the law gives the ownership, in default of disposition by the former owner. But this doctrine does not hold good with respect to trusts 224] for charity. Every other trust must have a definite object. *There must be somebody in whose favor the court can decree performance.*"

Those ingredients are wanting here. There was no trustee who could take this trust. None who was capable of holding and transmitting it in succession, according to the devise, *forever*. And there was no *cestui que trust*. The "trust" had no "definite object." There was nobody "*in whose favor the court could decree performance.*"

"Can this devise be sustained as a charity? How stands the law on this subject? The territorial legislature, in 1795, adopted a statute, once in force in Virginia, which, as modified, declares that the common law of England, and the statutes made in aid of

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the common law, prior to the fourth year of James I, shall be the law of the territory. This statute, after several amendments, at different periods, and a re-enactment in 1805, was finally repealed in 1806.

This sequence of legislation negatives any supposed adoption in whole, or in part, of the English statutes, or of any compound of those statutes with the common law, when the statutory ingredient can be ascertained and separated. Hence our court has holden, "That the statute of uses, if ever in force in Ohio, became so by the statute of 1795 or 1805, and was repealed by the statute of 1806." *Howell v. Cin. Ins. Co.*, 7 Ohio, 276. That statute, therefore, and the other statutes which stand in the same category, are not in force in Ohio. 3 Leigh, 450; 4 Wheat. 1.

Rejecting, then, the authority of the statute of Elizabeth, and the decisions under it, I will consider how far *this* can be sustained as a *charitable* bequest, independent of the statute and of those decisions. And first, I would distinguish it from cases of another class which bear to it some analogy, though resting on very different principles; namely: *Dedications to public and pious uses*. This will be the more necessary, as I am advised that the decisions in this class of cases will be relied on as governing or bearing upon this case.

Dedications to public uses, if valid, create estates strictly legal; they consist in the transfer either of the title, or the possession of property *at law*, and they depend for their validity on the application of legal principles, the most common and the most cogent of which is the doctrine of *estoppel*; they involve always an immediate abandonment of the property by the owner, that it may be taken and applied to the specified use; and they consist in grants by the sovereign, or by an individual, for the benefit of a community, of which he is the founder; or dedications of land for the use of a \*church or burial ground, the spot being marked [225 off, and the possession yielded by the grantor, and received by the grantee, and applied to the particular use; or, of land set apart for a road or street, by the owner, the public being inducted into the use.

The Town of Pawlet *v. Clark et al.*, Cranch, 292, is of this class. The king, by his letters patent, incorporated the town of Pawlet; divided the land in said town into sixty-eight shares, and granted one share "*for a glebe for the church of England, as by law estab-*

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*lished in said town.* The points decided as law seem to be these: 1. That the church of England is not a corporation, but one of the estates of the realm, and is incapable of receiving a grant; but that any particular local church, with its parson or rector *inducted*, having the cure of souls, was a corporation, and could well take. But as by the ecclesiastical regimen, there could be no *induction* of a parson without a church (edifice), and no church without an endowment of *manse* and *glebe*, the dedication or grant, to the use of the church generally, preceded the creation of the corporation in which it was to vest. The allotment of the ground, and the erection of a cross thereon, was held a livery of seizin to the future church; and the common law, in deference to the canon, held the *fee*, in abeyance, ready to vest in the donee, whenever it should come into being. But this doctrine evidently arises out of the intimate connection of *church* and *state* in England, and it is so held for the purpose of giving to the laws, which govern *each*, mutual adaptation and harmony.

*Bently v. Kuntz*, 2 Pet. 566. In 1769, Bently and Hawkins laid out an addition to the town of Georgetown, in the colony of Maryland, and marked one lot on the original plan, "for the Lutheran church." This lot was used by persons of that persuasion, as a place of burial, from the time of the dedication, though there was not at that time, nor afterward, any incorporated Lutheran church in Georgetown, capable of taking the grant. After sixty years' occupancy of the lot as a burial ground, the possession was disturbed by the heir of the grantor, and a bill in equity filed to enjoin him. On the trial of which, the question of *legal right* to the possession and use came up. Justice Story, in delivering the opinion of the court, says: "If the appropriation is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee, and we think it may be supported as a dedication to public and pious uses. The bill of rights of Maryland gives validity to 'any sale, gift, lease, or devise of any quantity of land not exceeding two acres, for a 226] church, meeting, or other house of worship, \*and for a burial ground, which shall be improved, enjoyed, or used only for such purposes.' To this extent, at least, it recognizes the statute of Elizabeth, for charitable uses, under which, it is well known that such leases would be upheld, although there was no specific grantor or master. In the case of the town of Pawlet v. Clark,

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this court considered cases of appropriation or dedication of property to particular or religious uses as an exception to the general rule requiring a particular grantee, and like the dedication of a highway to the public;" and he declares it a case "in the protecting power of a court of chancery."

This case might well rest upon the "clause in the bill of right," making a gift of land "for a burial ground," valid without any grantor, for the designation on the plat was sufficient gift, or grant, if the grantee be capable of taking; or it would be equally valid by analogy, to a common or public highway, on principles laid down by the court, in the case of *White's Lessee v. City of Cincinnati*, 6 Pet. 431-498. That case was in substance as follows: The proprietors of Cincinnati, at the time of laying out the city, left a gore of land adjoining the river, which was called a *common*, and so marked on the original plat of the town. The common remained vacant for many years; the public passing over it at pleasure. In 1802, the town was first incorporated; about 1812, disputes first arose about the possession of the common, which continued for many years; until this suit was brought by White, who derived title from the original proprietors. Justice Thompson, in delivering the opinion of the court, says: "The right of the public to the use of the common in Cincinnati, must rest on the same principles as the right to the use of the streets: and no one will contend that the original owners, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement, thus dedicated to the public. All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases, and applies equally to the dedication of the common as to the streets. It was for the public use and the convenience and accommodation of the inhabitants of Cincinnati; and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owner for land thus thrown out [227 as public ground. And after being set apart for public uses, and enjoyed as such, and private and individual rights acquired with



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reference to it, the law considers it in the nature of an *estoppel in pais*, which precludes the owner from making such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." This principle, here laid down, of *estoppel in pais*, with its accompanying reason, applies with great force, in the case of *Beatty v. Kuntz*, above cited; and it is the governing principle in all those cases where a proprietor dedicates to any public or particular use one portion of his property, at the same time that he exposes to sale another portion adjacent to or dependent upon it. 6 Paige, 639-642; 6 Wend. 667; 4 Paige, 510.

The subject of devises direct to objects of piety or charity, or in trust for such objects, is wholly untouched by judicial decisions in Ohio; though we have numerous cases of dedications, by the living, to public and pious uses. The true principle upon which those cases are supported, is well laid down by Judge Lane, in delivering the opinion of the court, in *Brown v. Manning*, 6 Ohio, 303. "The subject of appropriations to public uses," says the learned judge, "has been frequently under consideration of courts in our counties, and it is now settled that when lands are dedicated by the owner to any lawful use, public, pious, or charitable, and are used for the object, and in the manner contemplated by the owner, it inures as a grant. The existence of a grantee is not essential to the validity of such dedication, nor is any form of words necessary to give it effect; if accepted and used by the public in the manner intended, it works an *estoppel in pais*, precluding the donor, and all claiming in his right from asserting any ownership inconsistent with such use."

The case of *Le Clerq v. Gallipolis*, 7 Ohio, 219, and *Thornhill v. McCandlis*, 7 Ohio, 135, pt. 2, are upon the same principle. The latter case having the additional ingredient that a trustee was appointed by the legislature to take charge of the dedicated property, and the heirs of a large number of the grantors had conveyed to such trustee. The action at law against a trespasser was sustained by virtue of the conveyance. Such being the ground on which that case was decided, it is needless to inquire, whether the dedication had all the requisites which would have made it valid as a dedication, against the grantor or his heirs at law or equity? If it were not so, the court assuredly do not decide that the intervention of

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the \*legislature could make it valid without the subsequent [228  
assent of the grantors.

In the *Methodist Church v. Wood*, 5 Ohio, 283, the question arose on a suit by the church, as a corporation, against one of its trustees, who had received money in the name of the church, both before and after its incorporation. A hypothetical question is raised by the learned judge who pronounces the opinion of the court, whether, if the suit had been for the land of which the money was the proceeds, it could have been recovered by the church; and he observes that the court are not prepared to say that they could not sustain their action. For myself, I think it very clear that they could. The land was conveyed to the trustees for the use of the church after the enabling statute of January 3, 1825; and if it had been made before the statute, and if, after its enactment the society occupied the premises, as a church or burial ground, with the consent of the trustee who held the legal estate, it would be good against him, and good also against the original grantor, as a dedication to public and pious uses. On this ground, it seems to me the case of *Morgan v. Leslie, Wright*, 144, 145, is sustainable, without conflict with any legal principle. It was a good dedication to pious uses.

But it is attempted to sustain this devise under the ordinance of 1797, and the provisions of the constitution in conformity thereto. I will not stop to examine the effect in this case of the general provisions in those instruments in favor of education and religion. They are declarations, by the founders of a great community, of the general principles of virtue, and knowledge, and religion, under and by which they could alone hope for the blessings of Providence on that work of their hands. But these have nothing to do with the rules of law, which should thereafter make valid a transfer of property for religious communities, or institutions of learning. The first clause, then, that demands consideration, is section 27 of article 8 of the constitution, which provides, "That every association of persons, when regularly formed within this state, and having given themselves a name, may, on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real, and personal, for the support of their schools, academies, colleges, universities, and for other purposes." Applied to the case at bar, what is this provision? If the president and directors of the Zanesville Canal

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and Manufacturing Company had, prior to the death of John McIntire, regularly formed themselves into an association, for the purpose of sustaining this charity, and had given themselves a 229] \*name, they would have been entitled to an act of incorporation, on application to the legislature, enabling them to take, and hold, and administer it, if devised to them. The construction creates no capacity in unincorporated associations to take or hold property, it merely points out a mode by which a capacity may be acquired, as a matter of right, on application to the legislature. When this devise must have taken effect, if at all, the Zanesville Canal and Manufacturing Company had no capacity to take or to hold this trust; and even if they had, it was not thrown upon them at all, nor was there an attempt on the part of the testator to clothe them with it. It was the president and directors, not the aggregate company, to which the testator devised it; and it is clear law that if a devise be made to the officers of a corporation, and their successors in trust, etc., and not to the corporation, it is void. In the case of Christ's Church College of Cambridge, 1 Wm. Black. 91, Lord Keeper Henley says: "The conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body, and therefore, it wants a person to take in perpetual succession."

Then as to the act for the relief of the poor, in force at the time of this devise, which provides that all gifts to the poor of any township, or to any person for their use, shall be available, and shall vest in the trustees of the township. It is a provision for a distinct and definite object, which is exactly defined. It provides a grantee and a trustee for a particular kind of gift, which is not *this*, nor like *this*. It is a provision for the support of paupers, not for institutions of learning. It is for gifts to the poor of the township, not for the poor at large, or some of the poor to be selected out of part of a township. Hence it can have no possible binding efficacy in this case.

Barker v. Wood, 9 Mass. 419, arose upon a devise of land, etc., to Joseph Barker, "for the use of the inhabitants of the second parish in Boxford, confining it to the use of the inhabitants of Boxford," but in fact the second parish included certain inhabitants of Andover. The parish was a corporation. The court say: "These latter (the inhabitants of Andover), being excluded from the benefits intended, the remaining inhabitants are not a corporation, and

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they can not take as tenants in common. The heir at law must hold until some one can make title under the will."

We have no decided case that touches the principle here under consideration. We have no statute that can apply to it, and no system, either judicial or popular, built up by custom, during the lapse of ages. This case is the first, and the only case in which this \*question has been agitated in our courts. We feel [230 confident in the conviction that the court will apply to it the clear and well-defined principles of law.

What, then, *was* and *is* the law on the subject in England prior to the statute of 43 Elizabeth, and since, in cases which could not be brought under the provisions of that statute?

It is very doubtful whether the English chancery had jurisdiction *at all* of charitable bequests, prior to the statute of Elizabeth. There is no *case whatever*, in or out of print, to be found, in which they have exercised such jurisdiction. There are many cases *after* the statute, which rest upon devises made before it, of which the following is a specimen :

Collison v. Hobart, reported in Moor, 888, was this: In the fifteenth year of Henry VIII, and before the statute of wills, a devise was made of lands for the repairing of a highway; more than *sixty years* after this the statute of 43 Elizabeth was passed. The old bequest was hunted up, and the land, which had in the meantime descended to the heir, was taken by force of the statute, and applied to the *charity*. 2 Vern. 452. The statute was familiarly applied to past, as well as future devises, making those good which were void *ab origine*. In other words, it divested the heir of property which had descended to him, untouched and unaffected by the will of his ancestor, or the law in force at the time of his death. I need not argue to the court that this can not be done, either by general or special law, under a constitutional government, where private property is held sacred.

The dicta which attribute to chancery this power over charities, independently of the statute, do, for the most part, give it to the chancellor, as the representative of the king acting in obedience to his behests, made known by his sign manual. That such a doctrine prevailed to a great extent since the statute is certain, and that many of the gross abuses which arose under the statute had their origin in the courtly submission of the chancellor to the will of a despotic king, is equally certain. The earliest case

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to this effect, that Lord Eldon could find, 7 Ves. 69, is *Frier v. Peacock*, Finch, 245; otherwise called *Attorney-General v. Mathews*, 2 Lev. 167, where there was a trust for a general charity to the poor. The commissioners, in order to make it practicable, limited the number to forty poor boys. Lord Keeper Finch reversed the order, declared that the charity belonged to the king himself to dispose of. So he acquainted the king with the case, and the value of the estate, and disposed of the charity according to his directions.

231] \*This doctrine had its rise in times when the judges in England held their offices at the pleasure of the crown, who was the fountain of justice, as well as of honor, and the source of all power—in unsettled and troubled times, when the boundary between the judicial power and the executive prerogative was ill-defined, and when the prerogative was bearing down every barrier that a free people could oppose to its progress. A few years before the decision of the case referred to by Lord Eldon, a lord keeper, Sir John Finch, is said by Clarendon (vol. 1, p. 73) to have declared that “while he was lord keeper, no man should be so saucy as to dispute the orders of the lords of the council, but that the wisdom of the board should be always ground enough for him to decree.” In *Eyer v. Countess of Shaftsbury*, 2 P. Wms. 118, Lord Macclesfield says, “That abstracted from the statute of Elizabeth, and antecedently to it, as well as since, it has been every-day practice to file informations in chancery for the establishment of charities.” This observation was thrown out *arguendo*, the point not arising in the case, and no authorities are cited to sustain it. On the other hand, Lord Rosslyn, in the case of the *Attorney-General v. Bowyer* (which was an information for the purpose of enforcing a charity), says: “It does not appear that this court at that period (from the statute of Elizabeth) had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmore, as far as tradition, in times immediately following, goes, there was no such informations as this upon which I am now sitting, but they made out the case as well as they could at law.” 3 P. Wms. 726. The cases cited by Lord Rosslyn clearly prove his correctness, while they show the plain common law mode in which charitable bequests were adjudged upon prior to the statute of Elizabeth. Porter’s case, 1 Coke, 23, was a devise of houses to the testator’s wife for life, upon

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condition to establish a charity. Instead of performing the will she made a long lease. The heir at law entered upon the lessee, and conveyed to the queen. The cause was tried upon an ejectment, brought by the heir, upon the ground that the wife, by the lease, had broken the condition. The defense was that the condition was void, as against the statute of mortmain, and therefore the estate of the wife absolute. It was held that the use was lawful, therefore the condition was good, and, being broken, the heir had the right of entry. In the case of Sutton's Hospital, 10 Co. 1, the validity of the creation of the corporation, before the grant of the lands wherewith it was to be founded, was questioned, under the mistaken notion that a charity, like a church, must be endowed \*before its creation, not, as Lord Elles- [232 more supposes, the validity of the deed of bargain and sale made, prior to the act of incorporation, and Lord Coke says several of the questions made in that case were not worthy to be mooted in that court.

There are several cases referred to in the argument in Porter's case in which *feoffments*, with conditions to apply the proceeds of the estate to some indefinite charity, as in case from Brownloe, to the poor generally, has been holden good. But this must be in the first place a *feoffee* to take the estate, and then, if the condition be broken, the *feoffor* or his heirs have right to enter, and neither of them could be compelled to apply it to the charity. The *feoffor* simply makes the *feoffee* the perpetual almoner of him and his heirs to the extent of the proceeds of the estate, allowing him to select at his own discretion the objects of his charity among the poor. If the *feoffor* perform his duty, the estate remains with him, and can not be reclaimed; if he neglect it, the estate reverts, and the charity is at an end. So, by parity of reasoning, if there were no grantor or *feoffor* who could take the estate subject to the condition, the *feoffment* or grant would be merely void. But it is evident from Porter's case that the donor or his heirs alone had power to take advantage of the breach of the condition. In that case it would seem, by his conveyance to the queen, that the heir willed the continuance of the charity.

It is curious to see what vague and confused notions have been entertained by some judges in modern times of these clear and simple principles of the common law.

The view which I have taken of the ancient doctrine is sus-

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tained by the modern English cases, which do not fall within the provisions of the statute of Elizabeth, the court of chancery, in all cases, refusing to execute a trust to benevolent or useful purposes, which does not come within the provisions of that statute, no matter how meritorious may be the object, keeping constantly in view the fact that all their powers over this species of gift and bequest are derived from that statute.

The case of *Morris v. Bishop of Durham*, decided by the master of the rolls, 9 Ves. 399, and afterward examined and confirmed by the lord chancellor, 10 Ves. 522, was this: Ann Cracherode, by her will, bequeathed her personal estate to the Bishop of Durham, in trust, to pay her debts and legacies, and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham shall in his own discretion most approve of. The master of the rolls says: "The only question is, whether 233] the trust upon which \*the residue of the personal estate is bequeathed be a trust for charitable purposes. That it is upon some trust, and not for the personal benefit of the bishop, is clear from the words; and it is admitted by his lordship, who expressly disclaims any beneficial interest. That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this court, has not been and can not be denied. There can be no trust over which this court will not assume a control, for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property which is the subject of the trust is undisposed of, and the benefit of the trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with respect to trusts for charity. Every other trust must have a definite object; there must be somebody in whose favor the court can decree performance. But it is now settled, on authority which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be decided by the king in some cases, in others by the court. Then, is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word, in its widest sense, denotes all the good affections men ought to bear toward each other; in its most restricted and common sense, relief of the poor. In neither

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of these senses is it employed by this court. Here its signification is derived chiefly from the statute of Elizabeth. The purposes are considered charitable which that statute enumerates, or which, by analogies, are deemed within its spirit and intentment." He then proceeds to inquire whether the trust under consideration comes necessarily within the intent of the statute; and finding it does not, he holds it void for the object expressed, but good to the next of kin. This decision was confirmed by Lord Eldon, and the reasoning of the master of the rolls fully sustained. On the particular point in question his lordship says.

"Then, looking back to the history of the law upon the subject, I say, with the master of the rolls, that a case has not yet been decided in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general. Upon those cases where the will devotes the property to charitable purposes described, no observation is necessary. In reference to those in which the court takes upon itself to say it is a \*disposition to charity, where, in [234 some, the mode is left to an individual; in others, individuals can not select either mode or object, but it falls on the king, as *parens patriæ*, to apply the property, it is enough at this day to say, the court, by long, habitual construction of those general words, has fixed the sense; and where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself, or the king, as *parens patriæ*, to execute it (I allude to the case in 2 Levins, 167), it is the duty of such trustees on the one hand, and of the crown on the other, to apply the money to charity in that sense which the determinations have fixed to that word in this court, viz: either such charities as are expressed in the statute, or to purposes having analogy to those. I believe the expression, "charitable purposes," as used in this court, has been applied to many acts described in that statute, and analogous to those, not because they can, with propriety, be called charitable, but as that denomination is by the statute given to all the purposes described." 10 Ves. 540.

I will not wander further into the wilderness of cases on this point. The result of them all seems to be, that in order to enable the court of chancery to interfere and support a trust which does not fall within the provisions of the statute of Elizabeth, the



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*cestui que trust* must be a definite person, capable of appearing in court, and demanding its execution. If these conditions do not exist, the trust is for the benefit of the heir at law, or next of kin; and the like was the condition of all trusts prior to the statute.

It is apparent, too, that the power of the king, as *parens patria*, over this species of vague charities, arises from the same source with the power of the court of chancery, and extends no farther. He can not, by his prerogative, unless it be absolute, make a devise good, which is void at law; for that gives him no right to seize upon the property of a subject, and apply it at his pleasure. He can merely, in certain cases, direct the application of funds well devised to charity under the statute.

Lord Eldon, in *Maggridge v. Thackwell*, 7 Ves. 67, 75, labors, perhaps with success, to settle the principles on which the king interferes in the application of charities, as *parens patria*, and after citing and examining the cases of *Clifford v. Francis*, Mos. 288, 381; *Attorney-General v. Sidenfire*, 1 Ver. 224, and the *Attorney-General v. Matthews*, 2 Lev. 167, he concludes: "So these three cases seem to have established at the year 1679, that the doctrine of this court was, that when the property was not vested [235] in trustees, and the gift \*was to a charity generally, nor to be sustained by the act of individuals referred to, the charity was to be disposed of, not by scheme before the master, but by the king, the disposer of such charities in his character of *parens patria*.

Now these are three ancient cases, but they were all decided under the statute of Elizabeth, and nearly eighty years after its enactment; and counsel will search in vain for precedents, where the king, prior to the statute of Elizabeth, has, in his character of *parens patria*, enforced the execution of a charitable devise, in chancery; in any case where there was no *cestui que trust* who could come into court as a party.

There is much force and truth in the observation of Henderson, J., in the case of *Dashiel v. Attorney-General*, 5 Har. & Johns. 401, where he remarks: "And it is believed that in England, prior to the statute of Elizabeth, no charity could have been established on an information in the name of the attorney-general, where the instrument creating it was defective, and the object of the donor's bounty so vague and imperfectly described as to be incapable of

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taking, if it were not a charity, and the thing intended to be given would vest in the next of kin. But that wherever charities were established on information, they were such as were valid at law, and the enforcement of which did not interfere with private rights."

I have no doubt of the correctness of this, in all cases where courts of justice were the medium through which charities were established, and enforced by the king. I recollect, however, to have seen one case, cited in support of the antiquity of this prerogative, and there are probably others of a like kind, where the king, as *parens patriæ*, has seen fit to plunder some of his loving children. It is this: On the suppression of the order of Knights Templars, in England, the king, Edward II, by the aid of an act of Parliament, seized their possessions and transferred them to the Knights-Hospitallers; I suppose upon the doctrine of *cy pres*.

But even if the king, by virtue of his prerogative, could overstep, or disregard the boundaries prescribed by the law, to the adjustment of individual rights, there is in this state, as organized under its constitution, no one department in which that undefined, overshadowing power centers. Not in the legislature, for they possess only the law making power, which deals in generalities, and has to do with the future; they are enjoined to hold private property sacred; they can not transfer it from one man to another, or to the public, by their mere will, expressed even in the form of law; they have no attribute \*which corresponds with the [236. prerogative of the British crown; and it would be even absurd to say that such a prerogative was vested in our judicial tribunals.

Before I leave this subject, I will refer to some opinions lately expressed by the courts in England, on the very loose and latitudinous construction which had been given by their predecessors to this statute, and especially on what is called the doctrine of *cy pres*, or the substitution of one charity, by the chancellor or king, for another which was attempted to be created by the donor. These substitutions of the will of the court for the will of the donor are all alike in principle, but differ in degree of apparent injustice, according to their more or less departure from the actual thing intended by the donor. Some of these, which are of high authority, are shocking to every feeling of legal morality, and it will be perceived that reform in this particular has come from judges of the legal bench, who not having, like the chancellors, been steeped in

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and saturated with the doctrine, have evidently looked upon the construction of the law of charities as an abuse which ought to be corrected.

In the case of the Attorney-General v. Bishop of Oxford, the trust was to build a church in the parish of A. and the parish would not let the church be built. Lord Kenyon held that it could not be built anywhere, and that the institution must totally fail. 1 Bro. C. C. App. 21.

So Mr. Justice Buller, in the Attorney-General v. Golding, 2 Bro. C. C. 428, held that where the devise was of eight houses to eight poor people that have paid most and longest to the poor books of the parish of D. and the dividends on eight hundred pounds, four per cent. to the eight persons, that as the devise of the houses was void under the statute of 9 George II, ch. 46, that the devise of the annuity, which was its incident and attached to the freehold houses, was void also, and could not be executed *cy pres*.

The master of the rolls, in the Attorney-General v. Whitchurch, 3 Ves. 243, doubted the correctness of Justice Buller's doctrine, but afterward, with some hesitation, he admitted it.

And the lord chancellor, speaking of the like cases, says, 3 Ves. 648, with some impatience, "I have not looked into all the cases referred to. Some of the cases seem to have gone the length of raising an idea that the doctrine of *cy pres*, as to a charity, ought never again to be mentioned in this court; I am not quite clear of that." But afterward, Lord Eldon, in the case of Maggridge v. Thackwell, 7 Ves. 87, seems to admit that the whole doctrine, as [237] built up by the \*court, under the statute, is wrong. "If," said he, "this strange doctrine, as I should have called it if I had sat here two hundred years ago, that you can find a charitable purpose in a purpose that is to fail altogether, can be shaken, I can do no more than allow it to go to a higher court." So, in the Attorney-General v. Jackson, 11 Ves. 367: "It has been argued, and two hundred years ago it would have been urged with great effect, that no distinction ought to be made in the proceedings between a charity and an individual; but at this time, it is quite too late to insist upon that." So, indeed, it was in England, for the law had been settled for more than a hundred years, and it was better, perhaps, it should be uniform than that it should be right.

Every point that arises in this case is discussed and decided in the case of the Baptist Association v. Hart's Exrs. The de-

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wise in that case was to "the Baptist Association, that for ordinary meets at Philadelphia annually," which was to be a perpetual fund for the education of Baptist youths for the ministry, to be selected by the trustees. With respect to the trustee, the court say: "The association is described with sufficient accuracy to be clearly understood, but not being incorporated, it is incapable of taking this trust as a society." And with respect to the *cestui que trust*, they say, "Are there any to whom this legacy, if it were not a charity, could be decreed?" 4 Wheat. 28; Conn. 301.

The case of *Barker v. Wood*, 9 Mass. 419, goes to the incapacity of the *cestui que trust*. It was this: Sarah Chadwick devised her land in the town of Boxford to Joseph Parker, to be used and improved during his natural life, and after his decease, she gives the proceeds to be expended for the use of schools among the inhabitants residing in the northwest parish in the town of Boxford, "confining it only to the use of the inhabitants of said Boxford, and to be distributed in the same way, among the schools, as money raised by the town for the support of schools is apportioned among the several districts of the town forever." The court held, that inasmuch as the northwest included part of the inhabitants of Andover township, and as they were excluded by the terms of the will from any participation in the testator's bounty, and as the remaining inhabitants of the northwest parish were not incorporated, *per totam*, the devise was holden void.

In *Jackson v. Cory*, 8 Johns. 303, the court say, "A grant to be valid, must be to a corporation, or some person certain must be named, who can hold in his own right or as trustee." 9 Johns. 74.

\*In *Jarvey's Ex'rs v. Letain*, 4 Leigh, 327, the testa- [238  
tor bequeathed to the school commissioners of South Farnham district and their successors, for the schooling of the poor children of the district, \$10,000, to be put out at interest, and the interest only to be applied. There are school commissioners of the county of Essex, and the testator was one of them at his death, but they are not a corporate body. There are no school commissioners of South Farnham district, nor any such district, that being the name of an ancient parish. Held, the bequest was void.

In the case of *Gallego's Ex'rs v. The Attorney-General*, 3 Leigh, 450, the testator having appointed his executors, by his second codicil, directed them to pay \$1,000 to the support of the

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Roman Catholic chapel in the city of Richmond, if it should be continued at his death; "and if the Roman Catholic congregation should come to the determination to build a chapel in Richmond, to pay \$3,000 toward its accomplishment." By the tenth codicil, he directed his "executors to lay by \$2,000, to be distributed among needy, poor, and respectable widows."

By the eleventh, he gave a lot in Richmond to trustees, with directions to permit "all persons belonging to the Roman Catholic Church, as the members thereof, to build a church upon it for the use," etc. Upon the most mature deliberation, after full argument, the court held all the above devises to charitable and pious uses void, because of the uncertainty of the devisees. Carr, J., says, page 461, "The pecuniary legacies of \$4,000 are in effect given to the Roman Catholic congregation, but for the building and support of a chapel, and the ground is given to trustees to permit the Roman Catholics to build a church on, for the use of themselves, and all persons of that religion residing in Richmond. The bare statement seems sufficient to show that under the general rule, as applied to ordinary legacies, these would be void. Who are the beneficiaries? The Roman Catholic congregation residing in Richmond. And who are they? Suppose you name them to-day; are those the same persons who constituted the congregation yesterday, or who will constitute it to-morrow?" And President Tucker, in his very learned and able opinion (p. 465), says, "There is no principle supposed to be more perfectly settled in respect to conveyances, than that every deed must have sufficient certainty as to the grantee who is to take under it. If there be such uncertainty as to the grantee, that it can not be known distinctly who is to take by the grant, it is *ipso facto* void for 239] that \*uncertainty. This, it would seem to me, is not merely a principle of common law, but a dictate of common sense; and hence this defect is equally fatal, whoever may be the grantor, for it is a defect, not of power in him, but growing out of the utter impossibility of effectuating the grant, by reason of the undefined character of the grantee." And after showing the uncertainty of the objects of the grants, and the impossibility of defining and fixing them, he proceeds (p. 466), "These, and a multitude of like difficulties, present themselves to the notion of any grant or conveyance to a religious society or to trustees, for their use. For in the eye of the law, the intervention of trustees does not remove a

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single difficulty. There is not more necessity for a properly defined grantee in a deed, than for a *cestui que trust* capable of taking, and so defined and pointed out that the trust will not be void for uncertainty. In short, there can not be a trust without a *cestui que trust*, and if it can not be ascertained who the *cestui que trust* is, it is the same thing as if there was none.

*Deshiel v. The Attorney-General*, 5 Har. & Johns. 392. James Conie, having directed the investment of his estate and appointed trustees to carry his bequests into effect, directs by his will that certain proceeds of his estate shall be "equally divided, one-half to be applied toward feeding, clothing, and educating the poor children belonging to the congregation of St. Peter's Protestant Episcopal Church, in the city of Baltimore, the other half to be applied toward feeding, clothing, and educating the poor children of Caroline county, State of Maryland, which attend the poor or charity school established at Hillsborough, the trustees of which said charity school shall receive from my trustees the aforesaid appropriation in payments every six or twelve months."

After a very full discussion, in which reference is made to the leading cases, *Buchanan, J.*, in delivering the opinion of the court, says:

"It is an admitted principle that a vague bequest, the object of which is indefinite, can not be established in a court of equity. Is this bequest of that description? We think it clearly is." After stating the terms of the devise, the learned judge proceeds: "Whenever the words *poor* or *poorest* have been used as term of description in a devise or bequest, it has been held to be insufficient for uncertainty, as a devise to twenty of the poorest of the testator's kindred. *Powell on Devises*, 419; 3 Com. Dig. 412, with many other authorities to which it is unnecessary to refer. In this case the bequest is quite as vague and indefinite as if it was to twenty of the testator's \*poorest relations, or to his poor relations [240] generally, or to the poor people of a particular county. Who are the poor people belonging to the congregation of St. Peter's Protestant Episcopal Church in the city of Baltimore? No court can know or have any means of ascertaining, and the description of the *cestui que trust* is so vague that none can be found who, upon the general principles of equity, can entitle themselves to the benefit of the trust."

"It seems to be supposed that the power of ascertaining and

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designating" the poor children belonging to the congregation of St. Peter's church is given by the will to the trustees, and that the beneficial interest of the *cestui que trust* may be sustained, by reason of the intervention of trustees capable of taking the legal estate, on the principle that "*id certum est quod certum reddi potest.*" Before I transcribe the answer of the court to the above-stated supposition, I will refer to a like argument used by the opposing counsel in this case, on which they seem solely to rest the support of the charity. In speaking of the mode of payment by the president and directors to the legatee, Amelia McIntire, they say, "In principle there can be no difference between the testator directing the company to pay the dividend to his daughter, and directing them to pay the same for the support of a school, unless it arises from the uncertainty of the objects in the latter case. But that uncertainty is in this case entirely removed by the power of selecting the objects of the charity being expressly vested in the company; a selection to be made from a certain class, within certain limits known and established by law, the limits of the town of Zanesville. *Id certum est quod certum reddi potest.*"

The arguments are the same in both cases, and the answer of the court applies to both. "If it be admitted (say the court, p. 399), that authority is vested by the will in the trustee, to ascertain and designate who are the poor children belonging to the congregation of St. Peter's church, it can not, abstracted from the statute, assist the case of the defendants, for being a personal trust, without the aid of the statute, the *cestui que trust* can only be brought into being by the ascertainment and designation of the trustees; and there being no ascertainment and designation, though certain selections have been made, no persons exist having in themselves a vested equitable interest which they are capable of asserting in a court of equity. The bequest, therefore, is too vague and indefinite to be carried into execution on general principles (there being none who can show themselves entitled to the beneficial interest), 241] but is void, and the \*subject of the trust being undisposed of, results to the next of kin."

The charities in England, so far as real estate, or money to be vested therein, or as far as the stocks are concerned, which are the chief materials for these permanent charitable trusts, are effectually cut off in England by the statute of 9 George II, ch. 36, which enacts, "that no lands, or any interest in, or incumbrance

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on land, or any money to be laid out in the purchase of lands, shall be given for any charitable use, unless such gift be made twelve months at least before the death of the donor, and recorded within six months after the execution thereof; or if the gift be of stock in the public funds, unless such stock be transferred six months at least before the death of the donor, and unless the gift be made to take effect in possession, for the charitable use intended immediately from the making thereof, without any power of revocation or reservation whatsoever, for the benefit of the donor, or any person claiming under him."

To this extent these devises are brought back to the distinctness and simplicity of common-law dedications to public and pious uses. It must be a gift by the living, absolute and irrevocable, and it must take effect in possession and use during the life of the donor, or it is void. Under this statute, if the devise be in anywise connected with or dependent on the purchase or improvement of real estate (as if it be in trust to erect or repair a school-house, and educate poor children), the whole devise is void, the principal with all its incidents, and the trust is for the next of kin. *Attorney-General v. Whitechurch*, 3 Ves. 142; *Attorney-General v. Golding*, 2 Bro. C. C. 12; *Attorney-General v. Bishop of Oxford*, 2 Ves. 46. And see 2 Ves. Jr. 387.

I refer to this statute, and the decisions under it, to show that in charities, as well as all else, whenever the English courts can escape from the shackles of authority, they construe devises according to legal principles, not by any loose and uncertain discussion, or any assumption as to what the testator would have done, had he known that he could not do what he attempted to do. They do not, as under the statute of Elizabeth, hold it void so far as it is illegal, and execute it *cy pres* by applying the fund to some other use.

*McCauley v. Henderson*, 1 Dev. Eq. 276, was this: Henderson, in his will, directed that a part of his property should be applied to the purchase of stocks, and the profits thereof to go "toward paying a minister of the gospel, who shall preach at the seceding congregation meeting-house called Gilead, in said county, on the great road leading \*from Charlotte to Beattie's Ford; the [242 party called the *Associate Seceding Party*.

The trustees of the meeting-house, at Gilead, refused to permit a minister of the associate seceding party to preach in the house.



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The bill prayed that the trusts might be executed *cy pres*, by appropriating the interest of the fund to pay a minister to preach in a new meeting-house, to be erected as near as might be to the old one.

Judge Henderson says: "This is not a devise to a religious congregation within the words or spirit of the act. The property is not given to the congregation to be used by them as they may think proper for their use and benefit; but it is given for a special purpose, in which, to be sure, they are interested." He adds: "They take, therefore, for a specific purpose, and are bound to apply the funds to that and no other use."

Then, after discussing the devise, and referring to the familiar test of its validity, he proceeds: "Is there any who can enforce the execution of the trust?" If it be valid, and "if there be more than is necessary for the object, the excess results to the next of kin. For we do not, as they do in England, apply it to the other objects, of a similar kind, by what is called the doctrine of *cy pres*."

The point adjudged in the case of *Inglis v. The Sailors' Snug Harbor*, does not bear upon this case, though some of the remarks of the learned judge may appear to do so. That the decision of the court does not, we may be certain; for the case of *Hart's Ex'rs v. The Baptist Association*, which is identical with the case at bar, is not considered by the court as being shaken, much less overruled.

Justice Thompson, in delivering the opinion of the court, dwells at some length on the sedulous care of the testator to affect his object, and the several modes which he devises to bring it about, one of which was an act of incorporation, and says:

"If the first mode pointed out by the testator for carrying into execution his will and intention with respect to this fund, can not legally take effect, it must be rejected, and then the will will stand as if it had never been inserted, and the devise would then be to a corporation to be created by the legislature, composed of the several officers designated in the will, to take the estate and execute the trusts." And, further: "The devise, in this case, does not purport to be a present devise to a corporation not in being, but a devise to take effect in future, upon the corporation being created;" and the court held it good as an executory devise.

The weight of authority, as we conceive, is with us to the full

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extent \*of placing this case on the same ground as a com- [243  
 mon devise, not to a charity, and that its validity must be tested  
 by the same principles. But in order to sustain our defense, it is  
 not needful to go thus far. A clear distinction exists between a  
 case like this, and the case of a trust for the use of an unincorpor-  
 ated church which nevertheless has a known and permanent  
 character and existence; or for an aggregate association of indi-  
 viduals, who are known and defined in fact, though not in law.  
 The case of a church is the most favorable, because ancient author-  
 ities, and the long-settled opinions of this Christian community,  
 give to every sect of Christians, united by a common bond of  
 faith, and association, an admitted existence. Hence a devise to  
 a trustee, for the use of any known church or denomination of  
 Christians in their aggregate capacity, might be enforced, when a  
 devise to a trustee not in being, for the use of such persons as  
 might be selected by such non-existing trustee, could not. A de-  
 vise to an incapable trustee for the use of such church or congrega-  
 tion as he should select, would be analogous to this: upon the  
 actual and distinct points in issue, the case of a trustee not in legal  
 being, and the *cestui que trust* depending on his selection. We be-  
 lieve that this case is sustained by no authority. All the cases  
 which we have seen that support it, depend upon statute, or a  
 long course of decisions, having their root and origin in the statu-  
 te of Elizabeth.

For it is to be remarked that here is neither trustee nor *cestui que trust*, and if the devise be sustained, both are to be furnished by the legislature or the court.

There are, as I have shown, no cases in England in which this has been done independently of the statute of Elizabeth, and none, we believe, can be found in the United States, save where that statute has been adopted in terms or its principles silently received or acquiesced in for a long period of time. If, then, the court should be inclined to go so far as to sustain a direct devise forever to uncertain bodies of men or associations, but who, by the continual succession of probable events, could be rendered certain, without the exercise of any choice or discretion beyond that of the simple construction and application of the will—as, for example, to unincorporated churches or societies for known and specific purposes, or a devise to the use of such bodies or associations of men, or a devise to the use of a poor school, when

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the person who is to receive the trust and make the selections is left at large, and therefore subject to the discretion of the court, or some one whom the court might appoint—yet they would not have gone the length by far of setting up this devise. It can not 244] be \*done without the application of the *cypres* doctrine to the full extent that it was applied in *Moggridge v. Thackwell*, about which I have already shown even the English chancellor doubted.

But if this devise be sustained, another important question will arise, namely, who is to take charge of the fund and execute the trust? Is it the legislature, by virtue of this branch of royal prerogative, which is supposed to have been transmitted to them as an inheritance from the political constitution of England, or by courts of equity in virtue of their general powers? I need not argue to this court that the legislature of Ohio have no inherent powers paramount or pre-existing the constitution, or derived from any other source but that; that the law-making power which solely and alone is granted them by that instrument, with restrictions and limitations, does not enable or suffer them to touch by direct and special act the property or the rights of an individual, or by any general law to interfere with or affect it. In other words, that department of our government can act only on the rights of men by laws, which deal in generalities, and which look to the future. But if the royal prerogative be conceded to them, does this devise, according to the principles claimed, fall within it?

Lord Eldon, in *Moggridge v. Thackwell*, aboved cited, says: "As early as 1679, the doctrine of this court was, that when the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by individuals referred to, the charity was to be disposed of, not by the master, but by the king, the disposer of such charities, in his character of *parens patrie*." This case, like the one he was considering, does not fall within that category. The devise here was not to the poor in general, and the charity was to be ascertained by the act of individuals referred to, though they, like Vaston in the case before the chancellor, were not in legal being at the time the devise took effect. This charity, therefore, could not be controlled by the king of England, nor can it be by the legislature here, if the political as well as legal principles of that kingdom be transferred to us.

And it is but justice to the legislature to say, that in the statute

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of March 14, 1836, they are studious to guard against every invasion of private right; and the court, in deciding that this property could not be controlled by the corporation created and made trustees by that law, would decide nothing against the constitutionality of the law itself, but simply settle the question on which the legislature doubted, and on the decision of which they rest the validity of the law.

\*If, then, this devise is to be sustained, and the trust executed, it must be done by this court, by a scheme, and it must be applied, not at random, but as near as circumstances will permit, to the object intended by the testator; a poor school in the town of Zanesville. Surely no one who knows and respects the law, can contend that this fund can be taken and applied to education generally. It might do much good in that way if it could be so applied legally, but the lawless precedent which it would force our courts to record, would do much more evil.

This court, then, if they sustain this charity, must do it on a scheme *cy pres*, pursuant to the presumed intent of the testator; then they must see that there be established, according to the purpose expressed in the will, a poor school, to educate poor children, to such extent as the testator's words justly construed imply. If the fund be more than sufficient to effect that purpose, then the residue becomes the property of the heir at law. The court having applied the fund *cy pres*, to effect the object of the testator, which, though not specific in itself, was strictly so as to the limits in place and purpose to which it was to be confined, can not take the residue upon a still more remote substitution *cy pres* the first substitution.

R. STILLWELL, for same parties.

H. STANBERRY, for the complainants:

The demurrer is to the whole bill; if, therefore, it is bad in part, it is bad altogether. It is shown by the bill, that McIntire devised, under certain contingencies, a portion of his estate to the establishment of a poor school in the town of Zanesville, and that the contingencies have happened upon which the bequest was to take effect. That the complainants have been incorporated by a public act, which authorizes them to represent the interests of the *cestuis que trust*, to manage the charity, and vests in them all the funds belonging to it.

The case so presented, is a good case for equitable interference,

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because: 1. The legislature has power to incorporate trustees to manage or to superintend a charity. 2. The trustees, so appointed, have stated sufficient grounds for equity cognizance. The bill is filed in the subject matter of the charity, and it is alleged that the defendants are in possession of the trust funds, and have misapplied the same to their own use.

The only ground upon which the defendants can rely, is that the act incorporating the complainants is unconstitutional. They [246] attempt \*to sustain this ground by the following points: 1. That the act takes away the trust granted to the Zanesville Canal and Manufacturing Company, by section 8 of their charter, and therefore violates their charter. In answer to this, we maintain: 1. That this case is clearly distinguished from all the cases which have been cited to show the unconstitutionality of the act. All those cases go upon the ground, that a trust established by a charter, as a college or university, must be regulated by the charter, and can not be changed by the legislature—and that, therefore, where the charter provides that the trust shall be administered by certain trustees, that feature of the charter can not be changed.

This trust is not of that character. No contract was made between McIntire and the legislature for the establishment of this trust—no charter was granted according to which it was to be administered. It was a charity at large. It was, therefore, for the legislature, by reason of its admitted jurisdiction over public charity and education, to see that this trust should not fail. In the exercise of this duty, the legislature might incorporate the trust, or grant a charter to the trust, and provide in that charter who should be trustees, or the legislature might appoint a trustee at large—an individual or a corporation, and direct such trustee to manage the trust.

The power of the legislature to change the trust is wholly different in the two cases. In a case of an establishment of the trust by the charter, providing in what way the trust shall be administered, the charter becomes the law of the trust—its compact with the state, and it can not be altered. In the other case, of the mere appointment of an individual, or a body corporate, no such consequence follows. Such an appointment is the mere designation of an agent, without interest or tenure of office, to manage a charity at large, without any law or charter for its regula-

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tion, and the appointing power possesses the correlative power of removal.

The appointment of a corporation confers no greater estate or interest than the appointment of an individual. Both hold their office by the same title—the legislative grant. Can it then be held that a person or body corporate, appointed to perform a public duty without salary or tenure of office, is not removable by the legislature? If an individual appoints an agent without interest, he can, at any time, put an end to the agency, and he violates thereby no contract. The same rule must obtain in the appointment or removal of a public agent. It will be shown in the sequel, that no case, as yet decided, has gone the length which the defendants would have the court go in this case.

\*Before we proceed to the consideration of the cases, it is [247 proper to understand the precise relation in which the two corporations, the McIntire Poor School and the Zanesville Canal and Manufacturing Company, stand in regard to this charity. Neither of these corporations was in existence at the time of making the will, or at the decease of McIntire. An unincorporated association then existed, which was established for manufacturing purposes. The founder of the charity directed the president and directors of this association, upon the happening of certain contingencies, to establish the charity, and select the objects of his bounty from a certain class of individuals. No present duty in relation to the charity devolved upon the persons appointed; it was entirely prospective, and might never be called into action. Before the contingencies happened, this association ceased to exist. A corporation for banking and manufacturing purposes took the place of the partnership for manufacturing purposes. The corporation was, in every legal sense, a new being, distinct from the old company. It was well seen at the time, that this merger of the partnership in the corporation would leave the contingent charity without a trustee; that upon the happening of the testamentary contingencies, there would be no trustees to manage it, and therefore the legislature was applied to for an appointment. This appointment was made by section 18 of the charter, in these words: "That the said corporation shall be authorized to act as trustees under the last will and testament of the said John McIntire, so far as he, the said John McIntire, has thereby authorized and empowered the said company to act, and for those purposes

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the said corporation shall be invested with all the powers, rights, titles, and privileges invested by the last will and testatment of the said John McIntire in said company."

It will be observed, that this section does not extend the powers of the trustees beyond the powers given by the will to the old company, or rather to the president and directors of the old company. It does nothing but authorize the corporation to act as trustees. The provision that the incorporation is to be invested with all the rights, powers, titles, and privileges of the old company, can only be understood by referring to the will for the grant of those rights. The will provides, that all the estate is to be converted into stock of the old association by the executors. That fund is not granted to the trustees, nor even the management of it, for it constituted, at that time, a part of the stock of the association. Only the profits of this stock were to be committed to the trustees, with which they were to establish a [248] school, and then select the scholars; and these were the whole of their powers and privileges as trustees.

I do not stop to inquire in what way, after the decease of McIntire, his stock in the partnership was made a part of the capital stock of the corporation. That stock is the fund from the profits of which this charity is to be endowed—the stock itself was not committed to the trustees. Nor shall I inquire into the policy of this legislative appointment. The legislature had the power to appoint any trustee—an individual or a corporation; and although a bank does not seem exactly the proper sort of trustee to superintend the purposes of charity or education, yet the appointment was well made.

The legislative power over this charity was not exhausted by this appointment. The charity remained as much a subject for legislative action after the appointment as before. It had yet received no charter to give it form and make it permanent. This, however, was accomplished by the act of March 14, 1836, under which the complainants claim. This is the act which the defendants claim to be totally void, because it takes from them the office of trustees of the charity, and gives that office to others. It by no means follows, as will be shown hereafter, that if, in that particular, this act be held void, it is void for all its purposes; but I am now endeavoring to show that it is not void even in that particular. It violates, say the defendants, their charter. Now what

is their charter? The canal company is not a college or an incorporated charitable institution, but a banking and manufacturing association. If their purpose of association, or their charter, was to administer this charity, we might well understand in what way their motion from the trust would violate their charter. Any one who reads their charter can see, at once, the purposes of their association, and that the accomplishment of these purposes, the security of the rights and privileges which the state intended to guarantee to them, are in no way connected with this charity. I am not one of those who favor the power to impair contracts or take away vested rights, but it would seem to push the conservative doctrine beyond all reasonable bounds, to maintain that a legislature having power to appoint a banking corporation to act as trustees of a charity, has no power to revoke that appointment. A law vesting a right in a corporation is of no more validity than a law vesting a right in an individual. If a law should appoint an individual to manage a public charity, without salary or perquisites, could it be said to vest a right in the constitutional sense of the term? I apprehend not.

\*I shall now proceed to the consideration of the cases relied upon by the defendants to show that the act incorporating the complainants is void, but first request the attention of the court to what is said in *Attorney-General v. Middleton*, in reference to the distinction between a charity with a charter and a charity at large. In that case, 2 Ves. Sen. 327, Lord Chancellor Hardwicke says: "Consider the nature of this foundation—it is at the petition of two private persons, by charter of the crown—which distinguishes this from the cases on the statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the crown to found or regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction, and that is from necessity; because there is no charter to regulate it, and the king has a general jurisdiction of this kind—there must be somewhere a power to regulate; but where there is a charter, with proper powers, there is no ground to come into this court to establish



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that charity, and it must be left to be regulated in the manner the charter has put it or by the general law."

The bequest to the poor school was a charity at large. If it had been founded by charter, that would have been the law for its regulation. This power of regulation, in the language of Lord Hardwicke, must reside somewhere. In England, it is in the chancellor exercising the prerogative of the king as *parens patriæ*. In this state, it is in the legislature until the granting of a charter, and then it is in the charter.

The cases cited by the defendants are: Trustees of Dartmouth College v. Woodward, 4 Wheat. 518; Allen v. McKean, 10 Amer. Jurist, 273; 1 New Hamp. 199; 2 Fairfield, 118; the case of the Ohio University, etc.

The Dartmouth College case is familiar to the court. The whole case turned upon the charter of the college. The legislative acts declared unconstitutional changed the most essential features of that charter, and were therefore held to violate the contract of the charter. At page 538, C. J. Marshall says: "It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been [250] made for the object, which will be conferred \*on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found."

In Allen v. McKean, 10 Amer. Jurist, 273, it appeared that Bowdoin College was founded by the State of Massachusetts, and the question was, whether certain acts of the legislature of Maine (the college falling within that state after its separation from Massachusetts) essentially modifying that charter, were constitutional.

The case of Merrill v. Sherburne, 1 New Hamp. 199, does not seem to apply. It is merely decided in that case that an act of the legislature, awarding a new trial in an action which has been decided in a court of law, is an exercise of judicial power, and retrospective in its operation.

The Ohio University case is upon the right of a trustee in a college with a charter.

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This case, then, is strongly distinguished from any one which has been cited as to the vested rights of trustees in a charitable or literary institution, in the important particular that this charity is without a charter. If the Zanesville Canal Company had been incorporated upon the subject matter of this charity; if their charter was a charter for the charity, and their officers its trustees, then the power to regulate would be fixed by the charter, and any change in the mode of administering the charity or the privileges of its officers would be a violation of a contract within the decisions which have been referred to.

But this is not only a charity without a charter; it is also a public charity. Lord Hurdwicke, in *Attorney-General v. Pearse*, 2 Atk. 87, says: "A devise to the poor of a parish is a public charity. Where testators leave it to the direction of a trustee to choose out the objects, though each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may properly be called public charities."

Before the passage of the act incorporating the canal company, it is not denied by the counsel for that company that the legislature had the power to regulate this charity. In that act the legislature, so far as this charity is concerned, does nothing more than authorize the company to act as trustees. According to the defendants' counsel, that imperfect legislative action exhausted the whole legislative power over the subject matter. The legislature could not afterward incorporate the charity, or give it a charter, or appoint other trustees. \*Now, it can not be [251] that, in regard to a matter of public concernment, the whole beneficial and necessary power of legislative regulation is thus taken away. I conclude, therefore, that even in the particular of the appointment of trustees to manage the charity, and the taking of that office from the defendants, this act is not unconstitutional.

2. If the court should hold it otherwise, it does not follow that the entire act under which the complainants claim, is void. This act does something more than merely to appoint trustees, and invest them with the funds of the charity. It incorporates the school; it declares the trustees a body corporate to further the objects of the will; to receive donations, and generally to represent the interests of the *cestuis que trust*. This is the first exercise of the legislative duty to give permanence to the charity.

In all the cases referred to, the unconstitutional legislation was.

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subsequent to the charter of the college or charity, and the question directly arose in actions at law, asserting a right to the corporate property, or some corporate or charter franchise. No one can doubt that the canal company may be called upon in a court of equity to account for their trust, and if they are found to have mismanaged it, a court of chancery has the power to take it away from them. 2 Story's Eq. Pl. 435.

Are the complainants competent to call for this account? It is said this power is now vested by law in the superintendent of common schools. However that may be, it shows the legislative power over the subject, and this particular grant was prior to the law giving authority to the superintendent, and is not repealed by it. The bill filed by those complainants refers to their act of incorporation; it claims, it is true, that in virtue of that act they are invested with the exclusive management of the charity, and with all its funds; but it also charges a most fraudulent perversion and misapplication of those funds by the defendant, and calls specifically for an account in behalf of the *cestuis que trust*.

I understand it to be admitted by the counsel for the company, that any individual of the town of Zanesville might have called upon the canal company for an account of their trust; and yet they contend that these complainants who are incorporated for the special purpose of furthering the objects of the charity, have no right to call for an account or to be heard in a court of equity, because the act of incorporation has in some of its features gone beyond the legislative power. An act of the legislature is entitled to more respect than it seems to receive from the defendants' counsel. 252] sel. There is no such doctrine that an act void in part is void altogether. But in truth this act is not void in any particular, even if it be held that the trust of the company is a vested right, for there is an express proviso in section 2 of the act, "that nothing contained in the act should be so construed as to affect the private or corporate right of any person or persons, or to change the will of John McIntire; on the contrary, it is to be construed so as to carry into effect the true interests and meaning thereof." If, then, the canal company has a vested right to act as trustees and to hold the funds of the charity, this act must be so construed as not to take away that right. Whenever the powers granted to the charter trustees come in conflict with the rights vested by section 18 of the canal company charter, there must be such construction as will

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not take away the prior vested rights; but for all other purposes and powers the act of 1836 must stand. The incorporation declared by it remains; the right to receive donations remains; the right to sue and be sued remains; and what is more, the duty to superintend the interests of the *cestuis que trust* remains. Here then, in the exercise of that duty, the trustees complainant appear before a court of chancery and charge these defendants with a total misapplication of the trust fund. Is any vested right violated by so construing this act of incorporation as to admit them to make this call?

What objection can there be to ordering the account? I take it the canal company does not claim to own this trust fund subject to no supervision or account. They can only object to the capacity of the complainants; and they say because the complainants have not the capacity to manage the charity or to hold its funds, they have not the capacity even to call upon those who do manage it, who do hold its funds, to show how they have performed their trust. The calling to an account is one thing, the right to the office of trustee or the charity funds is another. An individual who has no right to exercise the office of trustee or to hold the fund, may, say the defendants, nevertheless call for an account. It is true that the right to sue the canal company, or to call for an account of the trust fund in hand of that company, is not given in so many words by the act of incorporation. We can not say of the right to file this bill, "*lex ipsa loquitur*," but then, in the construction which the act invokes for the carrying into effect the purposes of this charity, can not the court hold that this mere right to sue, to inquire, should be sustained? The purpose of the act is declared to be that of securing to the *cestuis que trust* the benefits and advantages of the devise, and to carry the same into effect, \*and [253 with that view these complainants are incorporated; the right to sue, especially "for all purposes necessarily" connected with the objects of the act, is expressly given to them. One prominent object is to insure the benefits of the charity to *cestuis que trust*. Can anything more conduce to the accomplishment of that object than the sustaining of this bill?

I have not considered it necessary to inquire whether the Zanesville Canal and Manufacturing Company is now a corporation, or whether, in the language of section 15 of its charter, "all its privileges" are not forfeited by its failure to construct the

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canal by February 1, 1835. The court, on examination of the various acts touching that company, will see that if anything remains of it, it is only the mere legal entity. Nor have I considered it necessary to reply to what is said against the act incorporating the complainants, in reference to the recital in the preamble, that one of the reasons for passing the law, was the representation that the canal company had ceased to exist. No authority is adduced to show that a law incorporating a public charity, passed, in part, upon misrepresentation of fact, is totally void. *Le Clerq v. Gallipolis* does not go to that. But how is the misrepresentation shown? It is by the production and legal effect of other acts of the legislature, which, they say, establish the present existence of the corporation. The legislature could not be imposed upon by a misrepresentation, when they had (as they are supposed to have) the very evidence before them to detect the misrepresentation. But there was, in fact, nothing like a false statement. There may have been a mere error in law — the supposition that a charter was forfeited by *non user*, or by the extinguishment of the right to carry on the business for which the charter was granted. And if that be an error of law, if nothing but a judicial sentence puts an end to a corporation, there is, at least, very high authority to sustain it. In the *King v. Passmore*, 3 Term, 240, it is held that a corporation is dissolved by the death of all the corporators. It may lose its privileges without dissolution. 2 Bac. Ab. 31, n. c.

And when a corporation has ceased to be able to discharge its duties, or has lost its privileges, they may be conferred by charter on a new corporation, before dissolution or judicial forfeiture. 2 Term, 567.

But it is argued by the counsel for the canal company, that if the court sustain the bill against the demurrer, the complainants are thrown out at once by the answers. It might be so, if the case were presented upon bill, and answer, and replication. But 254] that is not its aspect. Exceptions have been filed to the answers, which are not touched in the argument for the company. If the complainants can call for an account of the trust, it is going too far to say, that they must take just such an account or such an answer as the defendants choose to give. That would be, in one view at least, answering to a very good account. I conclude this case, upon the matter of the exceptions, must go to a master, with

such directions as to the stating of the account, as the court may see proper to give.

*As to the validity of the charity.* The plea of David Young and wife introduces a new question, touching the validity of the charity itself. The points upon which this plea is attempted to be sustained, lead into a vast field of legal inquiry, and their resolution is to settle not only this case, but a great system. The facts upon which the question arises, are shortly these: On March 18, 1815, John McIntire, of Zanesville, by his will, after devising certain of his personal property to his wife, authorizes his executors to sell the remainder, and all his real estate (except that situate in Zane's grant, which was to be sold by them after his wife's death), and to vest the proceeds in stock of the Zanesville Canal and Manufacturing Company, and to pay his wife annually during her life half the profits of all his estate, real and personal. On the death of his wife, the executors are to sell his remaining real estate, except his mansion house, and vest the proceeds in the same stock. He next devises to his daughter (his only child) his mansion house, after the death of his wife, in fee simple, provided she leaves an heir of her body, and to her and the heirs of her body, all the rents, issues, interest, and profits of the stock, to be paid to her annually during her life, by the president and directors of the company. The will then proceeds as follows: "But should my daughter, Amelia McIntire, otherwise called Amelia Messer, die without an heir or heirs of her body, then my house and lot, with the premises, as before described, are to be held in fee simple by the company before described, for the use and occupancy of the president of said company, he paying into the fund aforesaid, for the use hereafter-described, a reasonable rent, to be fixed by the directors of the same; and the president and directors of said company are annually forever to appropriate all the profits, issues, and rents of my stock as aforesaid, and all my estate, of whatever kind the same may be, for the use and support of a poor school, which they are to establish in the town of Zanesville, for the use of the poor children of said town; the children who are to be the objects of this institution are to be fixed upon by the president and directors of said company."

\*The testator died in July, 1815, and his daughter Amelia [255 died in December, 1820, without issue. His widow, who was amply provided for by the will, intermarried with David Young, in

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August, 1816. They interpose this plea, claiming that the charity is invalid by reason of their being no competent trustee designated by the testator, and that Mrs. Young is entitled to the fund intended for the charity, as heir at law of the testator. The plea does not show, nor does it anywhere appear in the case, how Mrs. Young is heir at law. I do not stop to argue that objection, or to consider whether, if the fund is to go in descent, instead of to the charity, it is to go to the heirs of the testator, or those of his daughter. I appear for the charity, and failing that, have no concern who takes the property.

The point made by the plea upon which the failure of the charity is predicated, is the want of a testamentary trustee competent to take and to act. The argument for the plea makes another point—the uncertainty of the *cestuis que trust*. I understand the argument to proceed upon the following ground: That the whole doctrine of charitable bequests is built up in England upon 43 Elizabeth; that this statute is not in force in Ohio; that without it we have no legislation, and no principle in our jurisprudence or frame of government that can give validity to charitable bequest which would not be good as a bequest to an individual; and that the bequest in this case is therefore bad, the trustees being incompetent, and the *cestuis que trust* uncertain. If the validity of this bequest depended upon the question whether 43 Elizabeth was, or is, in actual operative force as a statute in this state, I should have nothing more to say; for I do not believe that it ever so entered into our system. It would seem from the argument of the counsel for Mr. Young, that the opinion is entertained that at one time, from the passage of the declaratory law of February 14, 1805, to its repeal, January 2, 1806, this statute was one of our statutes, by adoption, and an argument against its subsequent existence here, is drawn from that opinion.

The act of February 14, 1805, declares that the common law of England, and all statutes in aid thereof, prior to 4 Jac. 1, and also the several laws in force in this state, shall be the rule of decision, and shall be considered as of full force, until repealed. The act of January 2, 1806, repeals so much of the declaratory act as declares the common law and the statutes in aid thereof prior to 4 Jac. 1, to be in force as the rule of decision in this state, leaving that part of it untouched which declares that the laws in force in this state shall be in full force.

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\*It must be admitted that so much of the common law and [256 the statutes in aid thereof as were in force here prior to the declaratory act, continued in force after its repeal; that is, just so much of both as was suited to our circumstances, our policy, and our institutions. I very much doubt whether any English statute had any further operative force by virtue of the declaratory act. Certainly, 43 Elizabeth had not. The proposition can not be maintained, that by operation of the declaratory act, this statute became one of our statutes, and had the same operative force as an act of our own legislature. Any one who looks into 43 Elizabeth will see at once that this could not be. It was local to the kingdom of Great Britain, and all its provisions were accommodated to the institutions and officers of the kingdom, so that everything to be done under it was to be done by a machinery unknown to us, the king, the lord chancellor, a court of commissioners, and a parish jury.

If, then, this charity depended for its validity upon the provisions of that statute, and there was no ground upon which to sustain it, or to execute it, except only by the court of commissioners, it would assuredly fail. This charity can be sustained on other grounds. Here, in the first place, we have the clear intent of the testator that his property should go in this way. He makes full provision for his wife, and then devises all the residue of his property to his only child. Looking next to the contingency of her death without issue of her body, which would leave no one who could have any claim on his bounty in the line of succession to him (a fact that is evident from the plea that his wife is his only heir at law), he provides for the foundation of a most commendable charity—the institution of a school for the poor children of a town which had grown up under his enterprise. This was not the act of one “saturated with charity” to the exclusion of all the obligations of kindred, nor at variance with the opening recital of his will, that it was his wish “to make a just disposition” of his property. Nor was it the declaration of a charitable intent at large, or even so vague that the particular object remained doubtful. It was for the purpose of education—for the education of poor children—not generally, but of a town having a defined territorial extent, and by means of the establishment of an institution through the agency of the president and directors of a company, and then the institution being established, the



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children "who are to be the object of this institution" to be fixed by the same president and directors.

There was at the time of making this will, and at the decease of the testator, just such a company as that referred to in his will, 257] of which \*the testator was a member—and there were seven individuals in esse, known to the testator, who were called its president and directors. Furthermore, this well-defined charity was in no respect against public policy; on the contrary, its object, the means of education for the poor, is sanctioned as the public policy, beginning with the ordinance, and continued and fostered as such through our constitution and our legislation down to the present time. Besides all this, the particular charity provided for by McIntire, so far as individual and legislative action and recognition are concerned, has been established and supported. The house has been built, the institution has been established, and for a series of years an average annual number of two hundred of the beneficiaries have enjoyed there the blessings of education. It is at this moment in actual operation. And all this has been done without the aid of the court of commissioners or the parish jury of 43 Elizabeth. The plea proceeds upon the ground that these things have been done against law; that there is an inherent vice in this bequest which will compel this court to disappoint the benevolent purpose of the donor, to break up this munificent charity, and give his wife, who he intended should have (and in lieu even of her dower) one-half of the interest of his estate during her life, the whole estate in fee simple.

Before I come to the consideration of the arguments and cases which are offered in support of the plea, I deem it proper to look more particularly to the public policy—the general and special legislation, and whatever else we have of judicial decision or common usage, bearing upon the subject.

It is declared by article 3 of the ordinance of 1787, that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." The constitution of the state carries out this policy. The concluding clause of section 3 of article 8 is in the very words quoted from the ordinance. Section 25 of the same article provides, so far as the poor are concerned in the means of education, "that no law shall be passed

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to prevent the poor in the several counties and townships within this state, from an equal participation in the schools, academies, colleges, and universities within the state, which are endowed in the whole or in part, from the revenue arising from donations made by the United States, for the support of schools and colleges." Section 27 provides, "that every association of persons, when regularly formed within this state, and having given themselves a name, may, on application \*to the legislature, be en- [258] titled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and for other purposes."

I stop one moment to consider this section in another point of view, than as establishing a public policy—and that is as to its direct bearing on the point made by the counsel for Mrs. Young, as to the want of capacity of the trustees, the officers of an unincorporated association, to administer a perpetual trust. It will be observed that this section points out the means by which such an association shall be enabled to hold estates for the support of schools. The capacity to take is not, and need not to have been given. Every voluntary association for purposes not forbidden by law, has a capacity to take an estate, either by grant to them individually, or in their partnership name, or to their agents; but they can not hold as an association any longer than all the individual members are in *esse*, and upon the death of any one of them the estate of the person so dying goes, in the course of descent, not to his survivors, but to his heirs. But this section provides against that contingency, and as a matter almost of right, for the acquiring of the faculty, to hold estates as an association and by a name. It gives the legislature ample power over the subject, and provides a means for corporate succession in the holding, as well as in the future acquisition of estates. When we consider the argument for the plea, that this bequest was to the officers, *qua* officers of an unincorporated association, that it was therefore void, because there could be no succession to carry on forever the trust, and administer the estate for the support of the school; and when in that connection we consider the subsequent act of the legislature incorporating this association, not only for the purpose of holding their own lands, but for the declared object of administering this trust and holding the rights and titles incident thereto, under the will of McIntire, and the yet more recent legislation incorporating

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the school itself as established, the importance and effect of this constitutional provision become apparent.

I now pass on in the consideration of the public policy of our legislation. As early as June 19, 1795, the governor and judges of the territory adopted a law from Pennsylvania, entitled, "A law for the relief of the poor," 1 Chase Stat. 175, section 14 of which is in these words: "All gifts, grants, devises, and bequests hereafter to be made, of any houses, lands, tenements, rents, goods, chattels, sum or sums of money, not exceeding in the whole the yearly value of \$1,200, to the poor of any township, or to any 259] other \*person or persons, for their use, by deed or by last will and testament of any person or persons, or otherwise howsoever, shall be good and available in law, and shall pass such houses, lands, tenements, rents, goods and chattels to the overseers of the poor of such township, for the use of their poor respectively." On February 22, 1805, the legislature passed an act for the relief of the poor, 1 Chase's Stat. 514, section 10 of which is precisely the same with the before-recited section, except that the restriction as to the yearly value is taken off, and the property is made to pass to "the trustees of such township and their successors in office, for the use of their poor respectively, under such regulations as from time to time shall be made by law." This section was re-enacted, in so many words, by section 11 of the act of February 19, 1810 (1 Chase's Stat. 696), which was in force at the making of the will, and at the time of the testator's death, by section 10 of the act of February 10, 1816 (2 Chase's Stat. 945), and by the act now in force of March 14, 1831 (3 Chase's Stat. 1834).

It is well, in passing, to consider for a moment this last series of legislation, which was begun before our constitution, and remains to this day. It has other bearings besides, as indicative of the public policy as to charities to the poor. It declares that all gifts, all devises to the poor of any township, or to *any* person or persons, for their use, by deed, by last will, or *otherwise howsoever*, shall be valid in law, and vest the property in the township trustees, for the use of the poor, under such regulations as may be made by law.

Now, it is admitted that if 43 Elizabeth were in force here, the devise in the will of McIntire would not fail. This statute is infinitely stronger than the statute of Elizabeth. The whole system of judicial decisions as to charities, so far as it has grown up

by construction of that statute, is based upon the recital, that land, tenements, etc., given, limited, and *appointed* for the relief of aged, impotent, and poor people, had been by fraud, prevented from the charitable purposes intended, which evils require remedy. Under this bare recital, and without the use of the machinery provided by the statute, the English chancery has sustained all manner of charitable bequests, because it was fit, where there was any sort of *appointment* to a charity, it should not fail, but should be fulfilled as *near* as possible to the intent of the donor; or if that were unlawful or impracticable, it should be diverted to some other charitable use, although that might be as *far* as possible from the use intended.

If our court would follow the English cases, if the statute of Elizabeth were in force here, why not, in the construction of our own statute, so much stronger in its terms, acknowledge, [260 at least to a reasonable extent in the support of a charity, the force of those decisions? This bequest is not within the letter of our statute—it is not specifically a devise to the poor of Zanesville township, or to a person for their use; but yet, if there was no way else of sustaining it, I do not doubt it would be sustained by the equity of that statute. A devise for the education of the poor of a township would not be within the letter of the statute, and under our poor laws, as they now stand, the trustees of the township could not apply it to those uses, but the legislature could, by the express provision that the power to regulate remains in that body. So in a devise, specifically in the words of the statute to the poor, does any one doubt the legislative power to fix upon the beneficiaries, and to regulate the application of the fund to the support of the old, the education of the young, the building of houses or schools; or if the devise, instead of being to the poor, was to twenty paupers, or twenty of the poor of a particular township, and no way was appointed for their selection, could not the legislature, under this comprehensive statute, regulate, by law, the mode of selection, and all the details for the administration of the charity? Or suppose the devise were to the poor of the north half of township A, could not that come, at least, within the equity of the statute? The devise in the will of McIntire is to the poor children of a certain and defined part of a particular township, or what is the same thing under this statute, it is to persons for their use. Why is this not within the equity of the

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statute? Is it proper, in the construction of such a law, to stick in the bark? These children are the poor of that township, although not all the poor therein; and if the mode of selection provided by the will is ineffectual, have not the legislature the express regulation of that? If it be said that this would be a *cy pres* administration of a charity, what of that? If a court can execute an intention *cy pres*, may not the supreme power of the state do likewise, under the provisions of a general law, in respect, too, of a public charity? In truth, all this has been already done by the legislature in respect to this very charity—a charter has been given to it, in which its regulation is amply provided for.

I beg next to call the attention of the court to section 43 of the act of March 7, 1838, "for the support and better regulation of common schools, and to create permanently the office of superintendent," which, among other things, provides, "that it shall be the duty of said superintendent to take an account of all funds and property given in any way for the support of education, except chartered \*colleges; and report the condition of the same, annually, to the legislature; and for this purpose, he is authorized to examine books and papers of any trustee or trustees of such property; and where, in his opinion, waste is committed or about to be committed, either by misuse or non-user, he may report the same to the prosecuting attorney of the county, and such prosecuting attorney is hereby required to cause the proper investigation in the premises, by a bill in chancery, filed in the court of common pleas or the Supreme Court, in the name of the State of Ohio, against such trustee or trustees, or other person guilty of misuser or non-user; and such proceedings shall be had by injunction, decree, or otherwise, as shall prevent misuser of such property, and carry into effect, as near as may be, the object of the trust." 36 Ohio L. 35.

All property given in any way for the support of education, is made subject to the visitation of the superintendent. And wherefore? Because the support of education is a matter of public concernment, fostered and sustained by an unbroken series of legislation. Upon the complaint of this visitor, the chancery power of our courts is required to be exercised over the property; not to defeat its charitable destination, by the application of the strict rules of construction to the gift or devise, as applied to alienations which concern private rights; not merely to carry out the bequest

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in the very mode, or to reach the very object in the very mode intended by the donor; but, if that can not be done, to establish it *cy pres*, to "carry into effect as near as may be, the object of the trust."

With all this legislation, it seems to me a very useless and unprofitable inquiry whether our charities for education depend for their validity upon 43 Elizabeth, or any other English statute, and whether we can or can not follow the English cases which have sustained charitable bequests by the application of the doctrine *cy pres* in the construction of a statute which is silent as to it, when we have a statute of our own which makes it imperative upon our courts to apply that very doctrine rather than the bequest should fail. The legislation which has been thus far referred to, as establishing the public policy, has been confined to charities for education, and chiefly for the education of the poor; the charities for religious purposes have been equally encouraged by our laws, but time does not allow their recapitulation here. Whoever looks through the body of our laws, will discover the same liberal spirit pervading not only these kindred charities, but also every form of benevolence tending to a public use. We are not left to the precarious title of clear dedication and long use \*to [262] establish the public right. Our streets and squares, the places of worship and sepulture, pass under the simple forms of our legislation by a word written upon a plat. The usual forms of conveyance are omitted when the purpose is to vest a public or a charitable use.

Looking, then, to the whole frame and spirit of our legislation, if the question were now first presented to this court whether it could find a principle of decision to sustain this charity, I should have no doubt it would be found.

The difficulty as to the bequest most strongly urged against the charity, is the uncertainty of the *cestuis que trust*, and that the means of making them certain through the agency of the testamentary trustees can not be used. It is said no other agency can be resorted to, however near it may be to the agency designated by the will, because that could only be by the doctrine *cy pres*, and that can not be resorted to, as the statute of Elizabeth, out of which it has grown, is not in force in Ohio. The case of *Le Clerq v. Gallopis*, 7 Ohio, 221, removes the supposed difficulty. The court in that case say, "Where circumstances are so changed that the di-

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rection of the donor prescribing the use can not be literally carried into effect, the legislature, or the court in those cases where general intention can be effected, may lawfully, in some cases, enforce its execution as nearly as circumstances admit, by the application of the doctrine of *cy pres*." Here we have an explicit recognition of this doctrine as a rule for legislative and judicial action "in some cases," and when we find the leading case cited for the opinion to be *Moggridge v. Thackwell*, 7 Ves. Jr., we know that a charitable bequest is one of the cases.

I do not contend, nor is it necessary for this case, that our courts, having recognized the *cy pres* doctrine, are bound to follow the English cases upon the statute of Elizabeth the absurd length which some of them have gone. There must be a reasonable limit, which is well enough defined in *Price et al. v. Methodist Church*, 4 Ohio, 547. It is there said, "Can a court of chancery change a trust expressly declared by the grantor in trust? It may enforce the trust, and compel the execution of its provisions, according to the design and purpose of the grantor; but can it divert the trust, and so construe it as to defeat and thwart the object and purpose of its creator? We apprehend not." In the case of the *Methodist Episcopal Society v. Wood*, 5 Ohio, 287, it is holden that "the act securing to religious societies a perpetuity of title to lands and tenements, conveyed in trust for meeting-houses burial grounds, or residence for preachers, \*passed January 3, 1825, provides that such land, not exceeding twenty acres, that had been or thereafter might be conveyed to any person or persons in trust for the use of any religious society, should descend in perpetual succession to such trustees as should from time to time be appointed by any religious society, according to its rules, etc. This act was intended to remove all difficulty arising from all defective conveyances, and seems to us amply sufficient to effect the object, whether the trust be secret and implied, or expressed in the conveyance."

So, too, in *Morgan and others v. Leslie and others*, Wright, 144, which was the case of a religious society; it appeared that whilst the society was unincorporated and before the passage of the law as to religious societies, a deed was made to Leslie and other individuals as trustees for the society. Lane, J.: "The deed to the defendants and their successors, they not being a corporation, vests in law a life estate only in the grantors. The equitable es-

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tate may subsist for the benefit of the society, and chancery may enforce the trust, but the legal fee after the determination of the lives, reverts to the grantor and his heirs." Here is an express recognition of a chancery principle, which, before the statute, would save a religious charity where the *cestui que trust* was a fluctuating association of individuals. The learned judge, after noticing the passage of the act above referred to, concludes as follows: "And although this deed was made before the passage of the act, we hold it perfectly within the power of the legislature to mold or change the tenure of property in such manner as will best conduce to its due enjoyment by its legitimate owner." .

In the case of Bryant Thornhill et al. v. McCandless, 7 Ohio, 135, the facts were, that an incorporated land company in their deed of partition among themselves, made in 1806, provided that a tract of fifty acres, and other tracts particularly described, are given by said proprietors to be a perpetual fund for the support of the ministration of the gospel on the premises of the company, the avails to be equally divided among the ecclesiastical societies thereon, in proportion to their ratios of taxes, which is the only use for which said land is designed by the donors." No trustee was created by the deed. In 1834, a special act was passed by the legislature, by which the plaintiffs were appointed trustees, who, after giving bond, were to take charge and possession of this tract of fifty acres, and to rent or sell it for the use of the inhabitants. In 1835, a part of the members of the association and the heirs of some of the others conveyed to \*the plaintiffs all their right [264 to the land for the purpose of carrying the use into effect. No actual dedication *in pais* was shown; no use by the *cestui que trust*, not so much even as the primary act of division, which was by the partition deed to precede the use by the different societies. There was an objection interposed that the trustees had not given bonds, as to which the court gave no opinion, holding that as against a mere intruder, the conveyance to the trustees from some of the owners entitled them to recover. As to the other question in the case, the court say: "It is the received and settled law that a dedication for public, pious, or charitable uses requires a donee to give it effect. It is an equally well-settled principle in chancery that a trust shall never fail for want of a trustee, but that the necessary appointment may be made by the court. Since then the original use is a good one; since a court of chancery may appoint a trustee,



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if necessary, no objection presents itself to the exercise of the same power by the legislature, in a proper case, to secure the object to which the land was devoted, especially when the title is questioned by a stranger." It is well to note, in passing, that these remarks are in reference to a mere *paper dedication* to a religious charity, very ill defined, without trustee, and followed by a special act of the legislature supplying the defect. If there be any difference between a dedication in a partition deed and a dedication by last will, I am not able to see it.

This review of our legislation and judicial decisions, although very imperfect, must necessarily close here. It shows a public policy favorable in the highest degree to all charities and public uses, a course of legislative and judicial action to sustain that policy, and further than all that, a necessity from the usages of our people for all that has been done by our legislature and our courts. In this connection I beg to call the particular attention of the court to the case of *Whitman v. Lex*, 17 Serg. & Rawle, 88. The opinion of the court was delivered by Gibson, C. J., and it is stated to have been concurred in by Tilghman, C. J., and Duncan, J., who were on the bench when the case was argued. I shall extract very largely from the opinion, which states the facts of the case sufficiently.

"The will of George Gottfried Woelpper contains two bequests, which are said to be void for uncertainty. The first is a bequest to 'St. Michael's and Zion's churches,' of one thousand dollars, the interest of which is directed to be laid out for ten years, in bread 'for the poor of the Lutheran congregation,' of which the testator was a member. The second is a bequest of five thousand dollars, 265] to be put out in such manner that the interest shall be applied 'toward the education of young students in the ministry of the German Lutheran congregation, under the direction of the vestrymen of St. Michael's and Zion's church.' These churches were jointly incorporated by the style of 'the ministers, vestrymen, and churchwardens of the German congregation in and near the city of Philadelphia, in the State of Pennsylvania.'

"At the common law of England, these bequests could not be sustained, even where there is no uncertainty as to the person; if the bequest be on a trust, not defined with reasonable certainty, it will fail, for it is clear the testator did not intend that the trustee should have the beneficial interest. Such a bequest, however,

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would take effect under 43 Elizabeth, c. 4, and this has drawn the counsel to argue against the extension of that statute to this country—a point that must be conceded. But, we consider the principles which chancery has adopted, in the application of its principles to particular cases, as obtaining here, not indeed by force of the statute, but as a part of our common law; and where the object is defined, and we are not restrained by the inadequacy of the instrument, which we are compelled to employ, nearly if not altogether, we give relief to that extent, that chancery does in England; and this part of our system has been produced by causes, which worked as powerfully here, as did those which produced the system of relief, that sprung from the statute of charitable uses." The chief justice next refers to the early and simple institutions of the people of Pennsylvania; their ignorance, as to the necessity of corporate succession, to perpetuate charitable and religious donations; the frequency of such bequests; and the uniformity with which, notwithstanding their defects, they had been sustained. He then states the inquiry to be, how far the English decisions were applicable to their circumstances, and after referring to the provisions of the statute of Elizabeth, and the immeasurable length which they had gone beyond them, he arrives at the conclusion, that "most of the decisions are independent of the statute, and, therefore, in a great degree applicable to the same wants and necessities elsewhere."

The opinion concludes as follows: "It is not intended to attempt an outline of this branch of our equitable jurisdiction, or to point out those particulars in which it differs from that which has been assumed in England. This must be a matter of gradual development, according to the exigency of the case that may arise. It may safely be suggested, however, that in many particulars, the relief which we shall be able to afford, through the [266] medium of common law forms, will necessarily fall short of that which would be administered by a chancellor. Indeed, no one would desire to see the doctrine of *cy pres* carried to the extravagant length that it was formerly, or witness the exercise of an arbitrary discretion in giving effect to a general intention to leave a sum of money to charitable purposes, to be designated thereafter, by disposing it to such charities as the court chooses to direct. No such discretion would be exercised by this court; on the other hand, not professing to found our jurisdiction on the

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statute, we are not bound, like the English courts, to restrain it to cases specifically enumerated in the preamble; and there is therefore little hazard in affirming that a bequest, such as in *Morris v. Bishop of Durham*, in trust to pay debts and legacies, and to dispose of the residue to such objects of benevolence and liberality, as the legatee may approve, would be sustained here. For the present, it is sufficient to say that it is immaterial whether the person to take be *in esse* or not, or whether the legatee were, at the time of the bequest, a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation has been mistaken; if the intention sufficiently appears on the bequest, it would be valid."

I have cited this opinion at large, not so much as a decision, (although in that view it is directly in point, and of respectable authority), as for the persuasive force of the reasoning, and plain good sense of its principles, as applied to the laws, the usages, and the necessities of a people so like, in all particulars, to our own. I shall now quit this ground, the only true one, as it appears to me, for the decision of this case, to follow the opposite counsel, in the inquiry, as to what has been decided in other states, under other systems of law and public policy.

The case of the Baptist Association v. Hart's Ex'rs, 4 Wheat. 1, is very much relied upon in support of the plea. That was a bequest direct to a voluntary association, "that for ordinary met at Philadelphia, for the education of youths of the Baptist denomination, who should appear promising for the ministry, always giving a preference to the descendants of the family of the testator's father." The testator was a citizen of Virginia; after his death, the association became a corporation under the laws of Pennsylvania. The case was of course to be decided in reference to the laws of Virginia, and was so argued by the counsel. It was [267] evident that the 43d Elizabeth, \*was not in force in that state; and, therefore, the court, proceeding upon that admission, and confining its powers to the chancery jurisdiction, independent of that statute, unaided by any domestic legislation, or policy, held the bequest void. Toward the close of the opinion, C. J. Marshall, says: "But even if in England, the power of the king, as *parens patriæ*, would, independent of the statute, extend to a

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case of this description, the inquiry would still remain, how far this principle would govern in the courts of the United States. Into this inquiry, however, it is necessary to enter, because it can arise only where the attorney-general is a party."

Now this case is distinguished from the case at bar, in many and important particulars. In the first place, as to the trustees: A voluntary religious association, collecting together from all quarters, and only ordinarily at one place, is quite different from a manufacturing partnership, or from seven distinct individuals of the partnership. This very distinction was afterward recognized by the same court, in *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99. There was a trust to be executed, which in some of its features was to be perpetual; and certain officers of the city and State of New York, who were only designated in their official capacity, and their successors, were forever to superintend the charity; which of course involved the continuing selection of the beneficiaries. The court, in distinguishing the case from that of the Baptist Association, say: "In the case now before the court, there is no uncertainty as to the individuals who were to execute the trust. The designation of the trustees, by their official character, is equivalent to naming them by their proper names. Each office referred to, was filled by a single individual, and the naming of them by their official distinction, was a mere *designatio personarum*. They are appointed executors by the same description, and no objection could lie to their qualifying and acting as such. The trust was not to be executed by them in their official characters, but in their private and individual capacities." The court then go on to say, that even if this were not so, if the trust were to the officers *qua* officers, and it could fall within the Baptist Association case, the trust could be sustained by the provision in the will, as to a future corporation.

It happens that the officers so designated were in number precisely the same with the officers of the canal company; so that there is no difficulty, as to the numbers of trustees. Now, if the term of description—the chancellor of New York, the mayor of the city, "and their successors in office after them"—is construed to be equivalent \*to the naming of the incumbents by their [268 proper names, James Kent, Richard Riker, or whoever they may be, why should not the same construction, under the same circumstances, be given to the term, "The president and directors

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of the Zanesville Canal and Manufacturing Company?" Why are we not to understand thereby Geo. Jackson, Daniel Convers, etc?

This case establishes a further important point, independent of the statute of Elizabeth; which is this, that where a practicable mode is designated for the selection of *cestuis que trust*, otherwise uncertain, the devise can be sustained as a charity, even where the very manner of selection, as by the death of the trustee named in the will, can not be followed. I admit that this rule is understood as subject to many exceptions, and one is that the object, the essence of charity, is to be fixed by the will; for when that is to arise from the act of a named trustee (as in *Morris v. Bishop of Durham*), the rule might not apply. But when the charity itself is well designated, and the only question is as to selection of beneficiaries, and those, too, out of a particular class in a particular place, the particular mode of selection is not of the essence of the thing. At page 119, the court in reference to this, say: "It has been urged by the defendant's counsel that these lands can not be charged with the trust in the hands of the heir, because the will directs that they shall not be possessed and enjoyed, except in the manner, and for the uses specified. That the manner and the use must concur in order to charge the trust on the land. But I apprehend this is a mistaken application of the term *manner*, as here used. It does not refer to the persons who were to execute the trust, but to the mode or manner in which it was to be carried into effect, viz: by erecting upon some eligible part of the land an asylum, or marine hospital, to be called the Sailor's Snug Harbor; and the uses were for the purposes of maintaining and supporting aged, decrepit, and worn-out sailors. Whoever, therefore, takes the land, takes it charged with these uses or trusts, which are to be executed in the manner above mentioned."

Who can read the will of McIntire and not see that the selection to be made by the president and directors does not regard the matter, but only the manner of the charity? The erecting of the institution, the founding of a perpetual charity for education, in his own town, and for a certain class of children of that town. This was the essence of the bequest, and as there must be some agency, some mode of carrying out his wishes, he selects, or rather he takes the same agency for that, which he had adopted for pay-  
269] ing the profits of his stock \*to his daughter. Did he mean

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that his daughter should perish for the want of means, if the profits were not paid to her by their hands? Did he intend that his charity should fail if they did not select the children?

There are other very marked distinctions between the case at bar and the Baptist Association case. I have shown we are here surrounded with legislation, usage, judicial decision—all tending to sustain us. In that case there was no ground to stand upon, but only the powers of chancery, unassisted even by the doctrines of the court, since 43 Elizabeth. The court look back into the beginning of the seventeenth century for some principle on which to sustain it, and they arrive, with labor and difficulty, at the conclusion that, although there are glimpses of such a chancery jurisdiction, there is nothing safe to stand upon. Furthermore, in that case there was no legislative action except of the trustees' own state, and this was so adverse to the bequest, that afterward, in the case upon Gallego's will, President Tucker, referring to the legislative policy, feels bound to say that charity itself is not banished from Virginia. But in the case at bar, the *parens patria* authority, which, though spoken of by counsel as a flower of royalty, must exist in every government, has twice, specially interposed in favor of this charity. It has received more aid from the legislature than was extended to the religious charity in the case of Beattie & Ritchie v. Kurts, in reference to which Mr. Justice Story says: "The original plan and appropriations were constantly kept in view by all the legislative acts passed on the subject of this addition. We think that it might at all times have been enforced as a charitable and pious use, through the intervention of the government as *parens patria*, by its attorney-general or other law officers."

The course of the argument next leads us to the decisions in the different states. The doctrine of the courts of Pennsylvania has been already shown in the case of Witman v. Lox, 17 Serg. & R. 88.

In Virginia, charitable bequests find little favor. The case of Gallego's Ex'rs v. The Attorney-General, 3 Leigh, 450, was decided in 1832. The will of Gallego was full of charities. The particular one before the court was upon trust, to permit all persons belonging to the Roman Catholic Church as members, or professing that religion, and residing in Richmond at the time of the testator's death, to build a church, on a certain lot, for the

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use of themselves, and for every other person or persons of that religion who might thereafter reside in Richmond. The devise is 270] holden void, on the grounds, that the beneficiaries were too uncertain for the support of the bequest upon any other footing than as a charity; that a charitable bequest so indefinite could not be sustained by the principles of the common law or chancery jurisdiction, prior to 43 Elizabeth, which was not in force in Virginia; that the policy of Virginia was decidedly hostile, so far as religious uses are concerned, "to the grant of any privilege, however trivial." Then as to the *parens patriæ* power of sustaining charities before 43 Elizabeth, that is stated to belong to the legislature. President Tucker says, "That body (the legislature) is the *parens patriæ*, under our system, and it would have remained for it to point out the organ, which should administer its important function. My own opinion is decidedly, that it does not belong to the judiciary, even if it has existence anywhere in relation to charity. They must first be established to call this guardian power into existence."

The case of *Dushiell v. Attorney-General*, 4 Har. & Johns. 392, arose in the State of Maryland. It was a charitable bequest to indefinite *cestuis que trust*. The court, following the opinion in the *Baptist Association v. Hart*, hold that the peculiar doctrine, as to charitable bequests, originated in 43 Elizabeth, and was not in force in Maryland. The devise is not sustained. No public policy; no legislation; no judicial action; no common usages, appear in the case. The legislature had done nothing, with respect to that charity, to give effect to it either by special or general legislation. The courts of Maryland had recognized no principle analogous to the English decisions under the English statute.

In the State of Kentucky, charities are sustained upon the ground, that 43 Elizabeth is there substantially in force. Proceeding on that ground, the court, in *Gass. v. Bonta*, 2 Dana, 171, say they are relieved from "the vexed question, as to the true extent of chancery power and jurisdiction over charitable uses, independent of that statute."

The statute of Elizabeth can be shown to be just as fully in force in Ohio as in Kentucky. In Kentucky, they claim it by adoption from Virginia. We have it in Ohio from the same origin. Notwithstanding the repeal of the declaratory act in 1805, by the special reservation in the repealing act, the laws as they stood

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before the declaratory act were continued in full force. If we look, then, to that prior state of the law, we find, that as early as 1795, Ohio Land L. 322, the territorial authorities had recognized the British statute, prior to 4 James I, as a rule of decision. Whatever of doubt there may \*be as to that mode of adop- [271  
tion and publication, there can be none that, at least as rules for decision, as principles of jurisprudence—the English statute, and the doctrines of the English courts in their construction, then entered practically into our system, and were not banished by the act of 1806. No further than that is 43 Elizabeth in force in Kentucky.

The case of *Moore's Heirs v. Moore's Devises*, decided by the same court as late as 1836, 4 Dana, 35, was a charitable bequest, very much like the case at bar. It provided that, upon the death of testator's son, the real estate devised to him should be converted by his executors "into a fund for educating some poor orphans of Harrison county, to be selected by the county court, who are the guardians of such, and to be confined to such as are not able to educate themselves." This charity is sustained on two grounds (either of which the court hold to be sufficient), independent of the statute of Elizabeth, and upon the operative force of that statute in Kentucky. The opinion delivered by C. J. Robertson is a very learned and elaborate one, and, being assured that it will have the attentive consideration of this court, I do not wish to break its continuity by any extracts.

In Massachusetts, they sustain charitable bequests upon their own system of law. The case of *Going v. Emery*, 15 Pick. 107, a charitable bequest of a very indefinite religious character, is sustained without the aid of a court of chancery, partly on the ground that 43 Elizabeth, in principle, was in force in Massachusetts, and partly because they had a statute in many respects similar, providing that "all gifts and legacies to the college, schools of learning, or other public use, shall be faithfully disposed of, according to the true and declared intent of the donor." See also *Bartlett v. King*, 12 Mass. 537.

In Connecticut, the question is yet open. In the case of *Green v. Dennis*, 6 Conn. 292, a farm was devised to "the yearly meeting of Quakers," an unincorporated body, upon indefinite trust. The action was an ejectment. The court says: "It has been insisted that if a bequest be for a charity, it matters not how uncer-



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tain the persons or objects may be, or whether the devisee be a corporation capable in law of taking; and in support of the principle, a number of determinations in chancery have been cited. The irrelevancy of the decisions referred to in relation to the legal title of the parties in this case is perfectly obvious. The court of equity have gone great lengths in support of bequests for 272] charitable purposes, and \*have frequently coerced the execution of them when no legal title had been created. The court go on to show that the legal title did not pass to the Quaker meeting, because it was not incorporated; nor to the individual members, because they were not intended.

In Vermont, in the case of Fuller's Ex'rs v. Griffin, 3 Vermont, 400, a devise to an unincorporated Methodist church of land, the interest of which was "to be appropriated for the support and payment of the constant preaching of the gospel in Charlotte," directing seven persons by name, "and their successors," to take charge of the land as trustees, was held good in an action of ejectment. The court, after noticing the incapacity of the trustees to take by succession say: "What is to be the result of this state of things? Shall the *cestuis que trust* lose the use for the want of a trustee? We think not."

How far the court of chancery of New York is disposed to go in favor of charitable bequests may be seen in the case of the Baptist Church in Hartford v. Witherell, 3 Paige, 300. In that case the chancellor says: "In the case of the Baptist Association v. Hart's Ex'rs, the Supreme Court of the United States decided that an unincorporated association could not take a devise to them in the name of their society, and that a devise of that description could not be executed by a court of chancery as a charity of the common law. But in a subsequent case, the same court sustained a bill by the nominal trustees of an unincorporated religious society, to protect their right to a lot of ground, granted for the use of such society by the name of Lutheran Church. And in the late case of Inglis v. The Sailors' Snug Harbor, they held the devise valid, which provided for the vesting of the property in a corporation thereafter to be created." The chancellor was here arguing to sustain, and did sustain, a conveyance made to an unincorporated society, by their names, and held that, by their subsequent incorporation, the fee passed to the corporate body under a statute, very similar to our statute, as to re-

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ligious societies. In *Coggeshall v. Petton*, 7 Johns. Ch. 292, the devise was to an unincorporated town for the purpose of building a town-house. The objection as to the validity of the bequest was taken. Chancellor Kent says: "The pecuniary legacy in this case is valid as a charitable bequest. The case of *Attorney-General v. Clark*, Amb. 422, and of *Jones v. Williams*, Amb. 651, show that bequests with descriptions and purposes as general as this have been held good as charities. *McCarter v. The Orphan Asylum*, 9 Cow. 437, is to the same effect. It shows that they go in New York upon the jurisdiction of chancery, aside from [273] any help from the statute of Elizabeth, or any of their own statutory provisions.

The case of *Shapleigh v. Pillsbury*, Greenl. 281, was in the State of Maine. A grant of land for the use of the ministry was sustained, although there was no person or corporation in esse to take. Chief Justice Mellen says: "Should such a principle be considered as sufficient to defeat such grants, it would, in numberless instances, frustrate the benevolent intentions of the legislature or of generous individuals in the bestowment of their bounty."

The opposite counsel has gone into a minute inquiry as to the condition of charitable bequests before the statute of Elizabeth, and arrives at the conclusion that the court of chancery then treated charitable bequests in the same manner as bequests to individuals. This is a question which has been long vexed in England. There is undoubtedly very high authority on both sides. It is scarcely possible that any new light can be thrown upon it since the case of *Moggridge v. Thackwell*. More recently the debate has been taken up on this side of the Atlantic. The prospect of a satisfactory result, notwithstanding the case of the *Baptist Association v. Hart's Lessee*, seems to be as far off as ever, for it is admitted by Mr. Justice Story, 2 Story's Eq. 394, n. 11, that recently Mr. Justice Baldwin, in the matter of Sarah Zane's will, has added to the difficulty by a collection of many cases antecedent to 43 Elizabeth.

But the question is not, whether charitable bequests stood on more favorable ground than other bequests before the statute, for as to that there is no doubt, but only whether the court of chancery, in the exercise of its jurisdiction by original bill, so regarded them. In the absence of an ascertained *cestui que trust*, which is

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almost always the condition of a charity in its creation, it is difficult to see how the matter of the trust could come before the court in the usual mode, or in any other way than by information of the attorney-general in behalf of the crown. It is very clear that in some way charitable uses were sustained. They have always been favorably regarded. Lord Eldon, in *Moggridge v. Thackwell*, following the opinion of Lord Thurlow in *White v. White*, 1 Bro. Ch. Cas. 12, supposes the doctrine to have originated in the principles of the civil law, or in the early religious notions of the English; and he states that long before the statute of wills there was a period when a portion of every man's estate was applied to charity, and the ordinary felt himself obliged so to apply it.

In the case of *McArtee v. the Orphan Asylum*, 9 Cow. 437, 274] \*Chancellor Jones investigates this branch of chancery jurisdiction with great research and ability. He says, at page 481: "It is admitted that there did exist a general jurisdiction over charities in England, anterior to the statute of Elizabeth, which was exercised by the chancellor; but that jurisdiction, it is said, was a branch of the prerogative of the crown, and did not belong the ordinary powers of the court of chancery. And elementary writers, of acknowledged merit, are cited to show that the superintendence of charities, in common with the charge of infants and lunatics, belongs to the king as *parens patria*, and that the jurisdiction of chancery in those cases does not appertain to it as a court of equity, but as administering the prerogative and duties of the crown. If this were so, the court of chancery in this state might, perhaps, claim the jurisdiction for the very reason that in England it did belong to the crown as *parens patria*." After referring to the analogous *parens patria* power over infants, and its entire assumption in chancery, and as to the old mode of proceeding by information where the *cestuis que trust* were uncertain, he proceeds: "But whatever may be the use or necessity of an information by a party in the name of the attorney-general, where the objects of the bounty are so circumstanced as to make it impracticable or inconvenient to sue in their own names, I am not prepared to say that it would, in any case, be incompetent to *cestuis que trust* of a charity to sustain a bill, or that a form of information by the attorney-general must be used, merely because the jurisdiction of the court over the charity to be established and

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enforced, may, in its origin, have belonged to the prerogative of the king as *parens patriæ*. The theory of that branch of the English system of jurisprudence may be, that the administration of charitable uses belongs to that jurisdiction; but the power has, from a very remote period, been constantly exercised by the chancellor in the court of chancery, and practically has become, I apprehend, as much a branch of his jurisdiction as the care and charge of infants, and perhaps as much so as the administration of other trusts to which the equity powers of the court are applied." The chancellor states that the chancery jurisdiction in New York is not assisted by any statutory provisions corresponding to 43 Elizabeth, and must proceed only on its general jurisdiction. He refers, for an instance of an extent of its jurisdiction, to the case of *Coggeshall v. Potton*, 7 Johns. Ch. 292, where a devise to an unincorporated town for a public use, was sustained as a charitable devise. The whole extent of that jurisdiction, he states not to be yet defined in New York. Again, at page 489: "Must the \*benevolent intention of the testator be frustrated, merely [275 because the agents he has chosen to dispense his bounty, are incapable of acting in the trust? Such a lamentable defect of justice would be a reproach to our system of jurisprudence." A question and answer very pertinent to the case at bar. The decree of the chancellor in the foregoing case was reversed by the court of errors on a ground independent of the positions quoted.

To hold that a charitable bequest is to be tested by the rules which apply to bequests to individuals, is in nine cases out of ten, to defeat it. There is, if this form of benevolence is to be encouraged, a sort of necessity for a more liberal rule. It is owing to this, rather than to any statutory provision, that the doctrines of the English chancery have been gradually developed, and are now, notwithstanding the mortmain act of George II, in daily exercise. 7 Eng. Con. Ch. 260; 8 Eng. Con. Ch. 140.

The same necessity and policy have led to the like doctrines in almost all the states. Except only in Virginia and Maryland, they everywhere find some ground to sustain their charities.

I do not see a necessity for following the learned counsel through the English cases, since the statute of Elizabeth, nor to notice, particularly, the manner in which a sort of odium is cast upon their chancery, by the selection of cases, long ago overruled, and as much condemned there as here. This charity needs

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no *ultra* doctrine to support it. We do not ask the court, by the perversion of the *cy pres* rule, to take it from the poor children of Zanesville, and give it to the children of the rich; nor even upon some general testamentary charitable intent, to frame a scheme, by which it shall go to a charity for education or religion, as the court or a master may deem proper. All we ask is that it be not perverted from the very purpose to which John McIntire devoted it. If others disregard his last request, we trust this court will not.

There is a suggestion made on behalf of Mrs. Young, that the proceeds of the fund appropriated to this charity, will far exceed the use intended, and that she is entitled to any residuum. That is a question the court is not now to decide. It must be recollected, that the beneficiaries are increasing with the rapid growth of a town, which, years ago, was spoken of by De Witt Clinton, as the "nucleus of a city."

In conclusion, I submit this case, so far as my clients are concerned, with the earnest hope, that this noble charity may be perpetuated. For more than twenty years after the death of McIntire, no question was moved as to its validity. Mr. Young himself, who, in right of his wife, now makes the claim for the fund, and who has heretofore called for a judicial construction of the will of McIntire, as to the rights of his wife in the bequest to her; has acted for a series of years, not only upon the belief of its validity, but as is shown by the abstract, was one of the building committee in the erection of the school-house.

The case does not require from the court the formation of any scheme for the administration of the fund. Whatever was necessary to make a defined intent practical, has been accomplished by the legislature. Nor does it require the court to establish any general principle, which will give effect to all the crude and impracticable forms of visionary benevolence.

G. SWAN, for the complainants, contended that the devise had not failed for want of a proper person to take; that the trustee had violated his trust, and the legislature had power to appoint a new one to see to its proper execution; and that the plaintiffs had a right to prosecute the suit. Upon the last point, among other things, he said:

It seems the corporation never questioned the authority of the legislature to make the appointment of trustees to the charity;

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but, on the contrary, its officers have assumed the administration of it, and claim a right to it under that appointment even now. The heir at law has also acted under it, without pretending it has devolved upon her for the want of an appointment. The answers and exhibits show this. Learned gentlemen on the other side might have spared themselves the labor of collecting authorities to show that the charter of private corporations can not be altered or repealed, except upon default of the corporation judicially ascertained, with the consent of the corporation.

We are not prepared to recognize the modern popular doctrines upon this subject, because we think they have been generated by party conflicts, and are, at best, the result of unenlightened public opinion, brought about by the incessant efforts of profligate aspirants for power. We hope soon to see the good sense of community expelling this delusion, and suffering this interest of the community with others to repose in security under the laws and constitution of the country. But while we concede to the gentlemen this principle, we by no means admit that clothing the corporation under consideration with the power of administering a charity, becomes a vested right, or in any sense a franchise, so as to be placed beyond the legislative \*control. It is a power— [277 a duty rather than a corporate franchise—and whatever it may be considered, may be devised without violence or injury to the objects for which it was created.

Our statute books are full of appointments similar in principle, nor has doubt ever been entertained of their validity. It would seem absurd to pronounce the appointment of a trustee to a charity, an executed contract between the government and the appointee, and place him beyond the control of the legislative power, so that he might hold the fund in perpetuity.

It is admitted that the Zanesville Canal and Manufacturing Company failed to build the dam and construct the lock or locks within the time specified in the act. Under these circumstances it seems to the counsel for the complainants that it was not strange that "certain persons in the town began to pretend" that the Zanesville Canal and Manufacturing Company had forfeited their charter, by reason of their failure to complete their canal and locks by February 11, 1835.

We shall endeavor to satisfy the court that this was something more than mere pretense of these certain persons in the town of

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Zanesville. It is admitted that questions arising from circumstances with regard to the surrender of franchises, under acts of incorporation, are seldom to be met with in the books. There is very little light to be drawn from adjudications in our own country upon the subject; for when questions of the sort have arisen, the courts have proceeded with great circumspection, and confined themselves to the question under consideration, lest some collateral interest might be affected by declaring corporations dissolved. We will examine the question upon general principles before calling the attention of the court to the provisions in section 15 of the act granting a charter to the Zanesville Canal and Manufacturing Company. It is laid down in Viner's Ab., vol. 6, p. 281, tit. Corporation: 1. That if a corporation be made of *confreres and sisters*, and after all the sisters are dead, all grants, etc., are void; for when the sisters are dead there is not any perfect corporation. So, a corporation founded by the name of brothers and sisters, and all the sisters are dead, and the brothers make a lease, the lease is void. So in Ib. 282, a corporation may be dissolved, for it is created upon a trust, and if that be broken, it is forfeited, and a judgment of seizure can not be proper in such a case, for if it be dissolved, to what purpose should it be seized? 4 Mod. 58, Sir James Smith's case. The doctrine as laid down in Angel and Ames on Corporations, 509, where the most of the authorities relating to the point are collected, is this, that if a corporation \*suffer acts to be done, which destroy the end and object of its institution, it is equivalent to the surrender of its rights. 19 Johns. 456. An election of trustees, made after the insolvency of the company, for the mere purpose of keeping it in existence, will not prevent a dissolution. 1 Hopk. Ch. 300. In the case at bar, the very end and object of the being of the corporation has been surrendered by the consent of the stockholders, and the stock actually distributed, or the avails of it, upon the appraisement, when condemned for public uses. Its franchises are gone with the objects for which it was created.

But the vexed question of what particular circumstances shall amount to a dissolution of a corporation, or what constitutes a forfeiture upon the general principles of law, without judicial determination between the government and the corporation itself, is not, in this case, necessarily before the court. Whatever doubts and difficulties may exist as to the forfeiture or dissolution of cor-

porations under particular circumstances, or under the circumstances in which the Zanesville Canal and Manufacturing Company have placed themselves, none can possibly be raised as to the power of the legislature to attach any condition or limitation to the grant of a charter they may deem for the security of the public, and to declare a positive and absolute forfeiture, as the penalty for negligence or default. With these views of the subject, we will examine section 15 of the act of February 24, 1816, 14 Ohio L. 303, which is in these words: "That unless the said canal and manufacturing company shall, in one year from the passage thereof, make and complete the lock in their dam, as directed in the act entitled 'an act to enable John McIntire and his associates to erect a dam across the Muskingum river,' passed February 22, 1812, so constructed as to enable boats to pass up and down at all times when there is water sufficient for boats to pass on the ripples in said Muskingum river, and unless the said company shall make and complete a canal, as directed in the act aforesaid, within ten years from the passage thereof, then, and in either of those cases, all the rights, privileges, and immunities granted by this act, shall cease and determine." It is admitted the acts were not done by the corporation, either by the time limited or by the further time granted by the legislature. By the charter itself, the contingency has happened which created an absolute forfeiture of *all* the privileges and immunities. The consequence of not complying with the requisitions of this section, and the further time given by the act of February 11, 1828, 27 Ohio L. 56, was not as the learned counsel for the defendants suppose—that of a forfeiture \*of a part of its franchises, to wit, the right to build a dam, [279 canal, locks, etc.—but in language too clear to admit of doubt, is unequivocally and unconditionally declared to be the loss of all the rights, privileges, and immunities granted by the act. No right, no interest, no privilege, no immunity, no franchise whatever, can escape the consequence of such neglect. The vitality of the corporate body is, by its creator, absolutely commanded to cease, and it must cease, or limitations, in charters, are mere mockeries.

We have already admitted that without some reservations in private charters, to alter, modify or repeal them, the legislature can do neither. This question we do not deem involved in the present case, but one of reserved power and its consequences.



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Reservations of this sort are unknown in England; and are of quite recent origin in this country. Legislative bodies have at last become ashamed of their own progeny, and, with the peculiar energy and injustice of uninformed power, are attempting to take them off by means not unlike the poison and dagger of the felon, and not altogether without his characteristic malice. These corporate bodies, concerning which it has been well remarked, that they are undefended by the same strong sympathies that guard individual rights, have nothing to oppose to the efforts of misguided power but their constitutional privileges, to be maintained by the judicial authority of the country.

The principle for which we contend, was considered by the Supreme Court of Connecticut, in the case of the Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 52. The case was in chancery, and an application to prevent, by injunction, the defendants from proceeding to erect locks, etc. The complainants, in 1798, applied to the general assembly, praying for liberty to erect a toll bridge, etc. An act of incorporation was granted for the purpose, and directing the bridge to be completed within six years, etc. The bridge and locks were to be kept in good repair. Time was given, from time to time, to complete this bridge and locks, until the same was suspended, and said company was discharged from the obligation to build the same, until the further order of the assembly. Afterward, the general assembly resolved that if the falls shall not be rendered conveniently navigable within three years, the grant should be null and void. This resolution was passed in 1818. In 1824, a new grant was given, and another corporation created, whose powers extended over the first grant to the complainants, and who are the defendants in the suit. The injunction was dismissed.

Judge Dagget observes (page 53, concerning the complainants):  
280] \**"They are not in the exercise and enjoyment of any right or privilege in relation to locking these falls; that to grant the injunction prayed for, will be to permit the complainants to lie by, hold this franchise, and prevent the legislature from authorizing any other company to do what was expected from them. The plaintiffs are not in the exercise or enjoyment of any right which the defendants are attempting to infringe, etc. The case of McLaren v. Pennington, 1 Paige, 102, contains a similar decision of the same principle. When a state legislature reserves the power of*

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repeal, etc., a repeal will be constitutional and valid. The chancellor says, page 109: "The reservation of a power in a legislative grant, if contrary to the common law, would of itself change the law in that particular grant; and the statute law of the grant itself would form the law in that particular case." So we say, by the very law of the grant itself to the Zanesville Canal and Manufacturing Company, its franchises were at an end, by neglecting to complete the bridge, etc., by the time limited in the acts for that purpose.

If we are correct in our views on this point, the complainants, who are a corporation created by the act of March 14, 1836, have been lawfully invested with the administration of this charity, and have a right to call persons who hold any part of the funds to an account in this court. This act will be found in 34 Ohio E. L. 514. The preamble reciting that the said canal and manufacturing company had ceased to exist by that or any other corporate name, was not a misrepresentation, but true in fact and in law. But, if it were otherwise, it would be without precedent to set aside an act of the legislature, by merely suggesting that it was procured by the misrepresentation and fraud of individuals. This act is not against common right and natural equity, but consistent with both. It was made to protect and perpetuate a valuable public charity; and, as such, ought to receive the most favorable construction the court can give it, for the furtherance of the object and to carry out the intentions of the founder.

There appears no necessity of considering the principle of *cy pres*, until it shall be ascertained that the charity fund shall accumulate after it shall have performed the object to which it is specifically dedicated. In that event, it may be extended to the poor beyond the limits of the town of Zanesville, or to objects within, not expressly pointed out by the will, upon the principle of *cy pres*, as in the case of 7 Ves. 334, or to others *ejusdem generis*. 3. Brown, Ch. C. 373.

But it is contended, that a forfeiture of the charter of the Zanesville Canal and Manufacturing Company must be judicially ascertained in a proceeding directly against it, at the suit of the government. As the negligence which declares a forfeiture, is admitted, what beneficial object could be attained by such a course? The facts are as well ascertained by the admissions of the

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parties, as they could be by the writ of *quo warranto*, information, or any other process known to the law in such cases. The facts are admitted; and the very constitution of the corporation contains the penalty of its own dissolution.

C. C. CONVERS, for the canal company, in reply. The counsel for the complainants attempt, with plausible ingenuity, to keep out of view the *two* questions involved between the new trustees and those named in McIntire's will, whose appointment was confirmed by the legislature. He assumes that "the only ground upon which the defendants can rely is, that the act incorporating the complainants is *unconstitutional*; and artfully asserting that the legislature intended by that act to wrest the trust from the canal company—to oust existing trustees, argues upon this assumption that the court can carry out that intent. We accept no such false issue? We claim that the case is disposed of before we reach the constitutional question, upon which, alone, counsel would have it decided, and which he is very anxious to discuss. The proviso to section 2 of the complainants' act, does away with the necessity of raising that question, by the express declaration, that no private or corporate rights shall be affected by it. A constitutional question ought not to be pressed into a case, which can as well be decided without touching such a question. But if the court incline to consider that question, it will be found that there is no such distinction as the counsel insist, between section 18 of the company's charter, and the cases cited to sustain the claim of the defendants to constitutional protection. The case of the trustees of the N. Gloucester school fund v. Bradbury, 2 Fairf. 118, is wholly at variance with the distinction set up, and completely explodes them. In that case the fund was derived from a public source, the government, for the purpose of education, and legislative trustees appointed and charged with its management; the trustees were incorporated, *not the cestuis que trust*, to superintend and manage the public gift, yet the court declare the act which seeks to take from these trustees, these agents of the public, as counsel would call them, those privileges and franchises without their consent, unconstitutional and void. The case before this court contains some important features not found in that. Here the gift flows 282] from a *\*private* source, and the testator appointed private individuals, his friends, whom he himself associated together, and to whom he had given a name—individuals who are afterward recog-

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nized and incorporated by the legislature, for the identical purpose for which they were selected by the donor. In the New Gloucester case the trustees were to perform their duties without compensation out of the fund. In our case the will provides that the company shall have the mansion house of the testator after the determination of the life estate of the widow intended as compensation for services to be performed under the will. The franchise of a trustee of the poor school in the case before us is valuable, therefore, as property, and can not be taken away by subsequent legislation.

Counsel say further, that the charity remained as much a subject of legislative action *after* the charter granted to the company as *before*. It had, he insisted, received *no charter* to give it form and make it permanent, before the act of 1836, under which the complainants claim. The fallacy of this is made apparent by the simple application of the old rule for the construction of new statutes, to consider the "*old law, the mischief, and the remedy.*" The old law was the charter of the company, which the complainants insisted had ceased to exist, by means of which "no person or body corporate were then competent, in law, to perform and execute the duty, and exercise the authority required of said company as trustees;" and in order to carry into effect the said devise, therefore, the new law could remedy the mischief, and the act of 1836 was accordingly passed to remedy this supposed want of trustees by incorporating new ones, precisely what the company was under their charter. Is it not a perversion, then, to say the law of 1836 incorporated this trust, or that it conferred upon the charity a charter to give it form and make it permanent? Laying aside his usual precision, counsel raises an *apparent* distinction between the powers which their act professes to vest in the complainants, and which the recital in the preamble, and the whole scope of the act itself, admits were once well vested in the company. The *new* trustees were created only *to take the place of the old ones*, who, it was alleged, had gone out of existence. Is it not absurd to say such an act was designed to incorporate the charity, or what is the same thing, the *cestuis que trust*? But who are the *cestuis que trust* named in McIntire's will? Not the whole town of Zanesville; not the rich men of Zanesville; but the "poor children" of that town; and not *all* of them, but only such as shall be selected by the president and directors of the company. What

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283] one of the "poor children" \*of Zanesville is named in the act of 1836? Are Peter Mills, John A. Gower, etc., named in the act, "poor children" of the town?

Counsel insist that section 18 of the company's charter was a mere appointment, like the ordinary case of a legislative appointment of an individual to perform a public duty. He is mistaken in supposing this charity a public one. Neither its creation nor its objects partake so much of a public character as the town of Gloucester case. That, flowing from the state, was open to the whole town; this, the gift of individual bounty, to such a certain class in the town as may be selected by the company. It is the hand of the company alone, that can point to the particular individuals, among the "poor children," selected as the object of the testator's charity he selects through them.

The whole subject of corporations and gifts in charity, whether public or private, is exhausted in the learned arguments and opinions in the Dartmouth College case. But this part of the argument, if it apply at all to corporations, can only apply to corporations *already* created, and in full existence when the appointment is made, and which it is then at liberty to accept or refuse without affecting its charter, not to those where the power, franchises or appointment, if counsel prefer, *is part of the charter itself, one of the elements of its very being.* This charter is an entire body, made up of several members—manufacturing, banking, school trust; yet all constituting one complete whole. It must be accepted entire, or rejected entire. As granted, and accepted by the company, it contained eighteen sections. It would seem clear that a charter containing only the seventeen first sections, is a different one, varying the contract. If the legislature can *strike out one* section without the consent of the corporators, why may it not *add* a section without their consent? Can the legislature compel a corporation already existing to accept a trust? The same principle which would permit the repeal of *one* section, will authorize the repeal of the *whole* charter. Every rule of law, by which variances between contracts are tested, declares the charter of this company with eighteen sections, a different instrument when section 18 is stricken out. The true question first to be decided, and which I think fatal to the claim of the complainants, is, did the legislature, by the act of 1836, *design to take away the trust* from the set of trustees then holding it, and performing their duties in

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the full exercise of their powers, and transfer it to a new set? or did they proceed merely to supply a supposed vacancy, occasioned by the supposed death of the former trustees? \*This ques- [284  
tion counsel evade, with the *gratuitous assumption* that the legislature did *design* to take away the trust from the existing trustees, and vest it in those newly created. Starting out upon this, the fallacy runs through his entire argument. The act of 1836 does not profess to remove the company from their office of trustee; for that this court has decided in Ohio, etc., *v. Brice*, 7 Ohio, 82, pt. 2, it can not do; but supposing the representations made by the complainants, as stated in the preamble, to be true, treats the office of trustee as vacant, by reason of the company and all the trustees under it "*having ceased to exist.*" The legislature in passing the act, proceed doubtfully and with caution, provide against its operation in case the representation on which its enactment was based should prove untrue in fact or in law. No one can read the preamble to the act of 1836, and the two first sections of the act, and suppose it intended to have effect, if the company in fact existed, and was at that very time "performing and executing the duty, and exercising the authority, required of said company as trustees."

The second point taken by counsel is, that admitting that the act of 1836, which provides that the McIntire school, therein incorporated, should be, and thereby was, "invested with all the property, estate, rights, credits, claims, demands, interest, powers, and authority, which by the last will and testament of the said John McIntire, deceased, was conferred on and invested in the canal company, with all the privileges to the same belonging;" yet this nowhere gives the corporation, thereby created, any visitatorial powers or authority to superintend the lawful trustees existing before, or to call them to account, but on the contrary professes to create trustees, and to vest in them the property, and which *denied* the existence of the lawful trustees, was nevertheless, after all this, *designed* to confer the right of visitation, and to authorize them to call the trustees claimed to be dead to account! Can anything be necessary to refute the proposition than barely to state it? Suppose all the act of 1836, which conflicts with the rights of the company, to be stricken out (and counsel admits that where the act conflicts with the charter of the company, the charter must stand), would anything remain to authorize the com-

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plainants to call the canal company to account? Nothing would remain but the preamble, "solitary and alone," and that declaring the company from which the account is sought had "ceased to exist."

Again, the legislature could not touch the visitatorial power (including the right to call to account), for that is a hereditament belonging to the donee and his heirs. It is *property* as sacred as 285] any other \*property. The bill itself is not framed and filed by the complainants as *cestuis que trust* having the beneficial interest, but as trustees—"in the capacity and as trustees of the McIntire Poor School;" and, if sustained, it must be in their corporate capacity as trustees, by virtue of their corporate interest in the subject of the bill. Edwards on Parties, title corporation. Even if, *as individuals*, they were interested in the subject matter, they could take nothing by the present bill. The whole scope and object of the bill proceeds upon the right of the complainants to the property in the hands of the company, which, by the act of 1836, was conferred upon them, and seeks its surrender, and a recognition by the company and others interested of their right *as legal trustees*. As auxiliary to this main object they ask an account that they may know the extent of their interest. It never entered into the mind of the draftsman of this bill that he could under it compel an account, except as in aid of and incidental to the relief. It seems to me to be trifling with the administration of justice on such a bill to ask for a *discovery* independent of the relief. The authorities upon this point are clearly with us. 3 Meriv. 161, 472; 6 Ves. 62, 63, 686; 10 Ves. 553.

But why sustain this bill in favor of these complainants, who commenced their warfare against the lawful trustees of the testator's own choosing, by false representations to the legislature, in aid of a design the first step in which is marked with falsehood? Why sustain it for the naked object of allowing them to look into the books of the company, when they did not even ask this of the legislature? Why longer keep the defendants upon this ocean of vexatious litigation, into which the misrepresentations of the complainants have launched them? Even now the superintendent of common schools may again, as he has already once done, call upon the company for an account; and his right is not disputed, because it is held proper that there should be some *general law* applicable alike to all, providing for the supervision of all charities.

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But we do protest against legislation in a particular case, and more strongly when an attempt is made to give such legislation an operation by mere *implication*, never contemplated by the legislature. The courts in New Hampshire and Massachusetts have decided such special legislation unconstitutional. Ample remedies exist in the hands of the superintendent of common schools to enforce the due administration of this charity, as far as the trustees are concerned, and by the court of probate, so far as the executor is concerned.

\*It is insisted, also, that the company, by ordering the ex- [286] ecutors to pay the debts of Amelia McIntire after her death, was guilty of a breach of their trust, though not willful. To this we only reply that it must be a *bad* construction of her father's will which would take away the only means of the daughter's support, while the property was yielding no revenue. The case of *The Harbardashers v. Attorney-General*, cited, does not go farther than to direct the existing trustees properly to apply the funds; it does not transfer the trust to others.

It is further contended that under the act of February, 1835, the company actually surrendered its charter when they sold part of their ground to the state. The counsel is not well informed of the situation of the company. There still belongs to it, after the sale to the state, most valuable real estate, some of which is under permanent lease, subject to revaluation for rents every fifteen years. Their banking business has not been entirely closed up, and some of its bills have been redeemed since the passage of the act of 1836. The stockholders, also, have large and important interests which require corporate action, and none are so deeply interested as Mrs. Young and the poor school fund. The case in 9 Conn. 52, materially differs from ours.

As to the other and most important question between the heir at law and the trustees of this charity, if the court doubt upon it, we prefer meeting that question in direct suit by the heir at law against the company, asserting the invalidity of the charity, to being called upon in this collateral way.

By the Court, *LANE, C. J.* The plaintiff's right to relief in the present case, depends upon their successfully maintaining the two following propositions, to wit, that the will of McIntire created a charitable trust, which this court can enforce, and that they are



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the lawful trustees. The first of these arises upon the plea of the heirs; the second is presented by the demurrers and answers of the other defendants.

We have entered upon the examination of this case with much solicitude; for the great value of the property, the very talented efforts of counsel, and the consideration that this is the first proper charity which has fallen under the action of this court, all unite to magnify its importance. The positions taken by the heirs to show the bequest void, are, 1. That the object of the testator's bounty are uncertain, and that the trustees had no capacity to take, because 287] the \*Zanesville Canal and Manufacturing Company had no existence as a corporation at the time of making and probate of the will. 2. That its corporate powers have been so forfeited as to terminate its existence. 3. That the bequest to the officers of the company, vests the estate in them, in that character, since they hold by an annual tenure, and are liable to be changed at each successive election.

It is admitted that such a bequest as this, would be sustained in England. However uncertain the object, whether the person to take be *in esse* or not; whether the bequest can be carried into exact execution or not; whether the general charitable intention is clearly manifested, a court of equity will sustain the legacy, and give effect to it in some form upon principles of its own. But it is asserted by the counsel for the heirs, that this lax and wide reaching jurisdiction in charities is peculiar to England, and depends on the statute of Elizabeth only. We would not unnecessarily enter into the much disputed and greatly perplexed inquiry of the extent of chancery jurisdiction over charities, independent of the statute. But one of the earliest elements of every social community upon its lawgivers, at the dawn of its civilization, is adequate protection to its property and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture, and its sepulchres; and in a proper case, the courts of our state might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth, as a necessary element of our jurisprudence. 2 Story's Eq. 389: 17 Serg. & R. 88; 9 Cow. 437. But without reference to these considerations, where a trust is plainly defined, and a trustee exists, capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it, by its own inherent

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authority, not derived from the statute, nor resulting from its functions as *parens patriæ*.

The property devised in this case, consisted of land, personalty, and stock in the Zanesville Manufacturing Company; the legal ownership of this was either in McIntire's executor or heir. The condition on which the devise ever took effect, was the death of the daughter without issue. The objects of the testator's bounty were the poor children of Zanesville, and the benefit intended was their education. There is no doubt that a trust attached to the property, whoever might hold it; "for whenever a person by will gives property, and points out the object, the property, and the way it should go, a trust is created." And a bequest of land to A. to construct an asylum for aged sailors, although inefficacious to pass the legal title, sufficiently \*defines the trust, and [288 charges the heir with its performance. 3 Pet. 119, 152; 1 Story's Eq. 415; 4 Wheat. appendix. The position, therefore, taken by the heirs in the plea, that the land descended to them on the death of the daughter, absolved from the trust, is not supported, but overruled.

The interests of the heirs are nevertheless involved in the case, for the next question arising is, whether the trusts which we have thus found to exist, shall be executed by the plaintiffs, who are the trustees under the act of 1836, or the Zanesville Canal and Manufacturing Company, who are the trustees designed by the testator, or upon the heirs upon whom the law throws the duty if there are no other trustees. In the statement and arguments made by counsel, it seems to be assumed that the Zanesville Canal and Manufacturing Company had no legal existence until 1816. I am not certain this conclusion is just. In 1812, a statute enabled McIntire and his associates to build a dam across the Muskingum, and cut a canal around the falls. The objects expressed in the preamble are the advantages of the water-works, and the improvement of the navigation. It authorizes them to acquire lands, for the purpose of making a canal, "*or the better to answer the objects of this act,*" and it gives the right of suit to any person injured by their neglect. The statute, therefore, imposes a common liability, and it implies the possession of common property, and the duty of accounting for profits. The organization of the Zanesville Canal and Manufacturing Company was had in 1814, in the form of a corporation. Now, the bare grant "*to hold Gildam mercatoriam,*"

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a mercantile meeting, has been taken to carry corporate power, on account of common expenditures, 10 Co. 30; 1 Roll Ab. 513; so a grant of land, to a town on rent, and other similar cases, Ang. & A. on Corp. 45. So the grant to a part of an ecclesiastical society, to repair their meeting house, confers corporate powers, 2 Day Conn. 259. It might, therefore, perhaps be plausibly contended that it was a legal existing corporation, before the date of the will, and the objection of their want of capacity to execute trusts might receive its answer, by the notification arising from the subsequent act of the legislature.

We do not, however, intend to place our decision upon this basis. The actual situation of the company in 1815, was that of a corporation *de facto*, with officers, and a capital stock of \$250,000, held in the form of shares. It was in reference to this condition, that McIntire made a disposition of its property. We have seen 289] that it consisted of his mansion house, lands, \*personalty and stock. It passed to the company for the purposes of this trust, not by the death of McIntire, but by a contingency which happened in 1820, and after the statute of 1816, which imposed upon them the most ample capacity for holding it. The bequest upon this trust, can take effect upon the very common ground as a remainder, contingent upon the death of McIntire, because limited to a person not in being, but becoming vested by the capacity acquired by the corporation, before the determination of the particular estate. And we should be justified in taking still stronger ground by the authority of a majority of the judges in the *Sailors' Snug Harbor*, 3 Pet. 99, in holding that a bequest upon charitable uses may take effect, as an executory devise, to a corporation subsequently acquiring the capacity to hold. It is, therefore, without difficulty we conclude that on the decease of the daughter, the property of McIntire passed to the Zanesville Canal and Manufacturing Company upon these trusts.

It only remains to enquire if their right to it has been lost, either by their own neglect, or by subsequent legislation. The act of 1836 was passed upon the supposed case, that this company had become extinct. It carefully saves the right of all persons in the property; consequently the company lost none of its interests, if it then had a legal existence. If the corporation has been dissolved, it is not through judicial action, but by the bare and naked effect of the statute limiting the time for the completion of the dam and

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canal. It must be observed, that it is not section 15 of the statute of 1816 which works this forfeiture, since the time there given is extended, in January, 1817, for one year, 15 Ohio L. 35, and in December, 1817, until December, 1818, 21 Ohio L. 53; and in 1828 is enlarged until February 11, 1835. The last act, 26 Ohio L. 57, 5, 26, 27, instead of declaring all rights, privileges, and immunities determined, in case of failure, like the statute of 1816, only provides that the Muskingum Navigation Company may *finish* the canal and hold it, until their expenditures are reimbursed. There is no forfeiture attached to the last enlarging statute, except what arises from mere lapse of time. No further legislative act works a forfeiture, except that resulting from the act of 1835, which recites that the Zanesville Canal and Manufacturing Company have lost "*its right to construct the work,*" and authorizes the canal commissioners to purchase from them. Now the modes by which a private corporation in our country is dissolved are: 1. By the death of its members. 2. Surrender of its franchises. 3. A judgment of forfeiture for non-user or abuse. But the Zanesville Canal and Manufacturing Company has continued an organized and existing body until the present day; there has been no judicial act [290 declaring a forfeiture, and the legislature, by the act of February 19, 1835, after the time of its supposed dissolution, recognized it as a person capable of contracting by authorizing a purchase from it. 33 Ohio L. L. 90. It seems, then, plain to us, that at the time of the passage of the statute of 1836, the Zanesville Canal and Manufacturing Company had not "ceased to exist," and that their corporate rights to execute the will of McIntire, through their officers, according to his true meaning, was not affected nor impaired; consequently, the incorporation of the new board of trustees was void by the terms of the act.

The suggestion that the bill may be sustained at the suit of these plaintiffs, as the representatives of *cestuis que trust*, can not be supported. This court would entertain a suit for mismanagement brought by the prosecuting attorney, 36 Ohio L. 35, sec. 43, or upon the relation of a party in interest; but such a proceeding would require a bill of a structure altogether different from this.

Bill dismissed.

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Thomas v. Town of Mt. Vernon.

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JOHN R. THOMAS v. TOWN OF MOUNT VERNON.

A town ordinance prohibiting the keeping a grocery without a license is valid, though it enumerate articles licensed to be sold by the court of common pleas, for state or county purposes.

The mayor of a town may have jurisdiction of breaches of its ordinances, though a citizen.

APPLICATION for a writ of error to the Supreme Court of Knox. The charter of the town gives the council power to make "such by-laws and ordinances consistent with the constitution and laws of the United States and this state, as they may deem necessary for the regulation, interest, safety, health, cleanliness, and convenience of said town, and the inhabitants thereof," and confers the "exclusive power to grant or refuse license to all ale houses, confectioneries or groceries, established within the limits of said town, and regulate the same as they shall think proper." It is made the "special duty" of the mayor to see the ordinances of the town enforced. A town ordinance forbids the opening of a "grocery shop, or vending by retail within the limits of the town, bread, cakes, ale, wine, porter, mead, cider, metheglin, beer, confectionery, or spirituous liquors," without license, under penalty of not exceeding five dollars.

291]. \*Complaint was made before the mayor against Thomas for having violated this ordinance, of which he was convicted and fined five dollars. Thomas brought this conviction before the court of common pleas, by a writ of *certiorari*, and assigned for error the following causes, viz: 1. That the mayor, being a citizen, was a party, and could not take jurisdiction to try the complaint. 2. That the mayor admitted the ordinance of the town to sustain his jurisdiction. 3. The ordinance is void, as in restraint of trade, and as imposing a tax upon the sale of articles exempt by law. The court of common pleas affirmed the judgment. Thomas brought a writ of error in the Supreme Court to reverse this affirming order of the common pleas, but the Supreme Court affirmed the order. Thomas now applies for a writ of error to the Supreme Court of Knox to reverse these proceedings.

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In the Matter of the Ohio Life Insurance and Trust Co.

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M. H. MITCHELL, for the application, cited 1 Salk. 397; 5 Bur. 1847; 5 Cow. 462.

H. B. CURTIS, for the town, insisted that the ordinance was valid; that a citizen of a municipal corporation was competent to take jurisdiction of offenses against one of its ordinances, or to be a witness. He cited 1 Bay. 382; Ang. & Ames Corp. 200; 5 Bur. 1858. The court unanimously refused the writ.

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IN THE MATTER OF THE OHIO LIFE INSURANCE AND TRUST COMPANY.

The seventh item of section 2 of the act incorporating the Ohio Life Insurance and Trust Company, "to buy and sell drafts and bills of exchange," confers no power to issue evidences of debt designed to circulate as money.

The only power of such company to issue bills and notes for circulation is contained in section 23 of the act of incorporation, which does not authorize the issue of bills or notes for circulation, payable otherwise than on demand.

THE special master, Goddard, appointed to examine into and report upon the affairs of the Ohio Life Insurance and Trust Company, reported at the last term that the company had issued notes or bills calculated to circulate as money, and payable on time, which were not authorized by their charter.

\*V. WORTHINGTON, solicitor for the company, took exception [292] to the report in that particular, and insisted upon the right to issue under the power in the seventh item of section 2 of the act of incorporation, "to buy and sell drafts, and bills of exchange."

By the Court, LANE, C. J. The authority "to buy and sell drafts and bills of exchange," contained in the seventh item of section 2 of the act incorporating the Trust Company, confers no power to issue evidences of debt designed to be used as money. The power of the company to issue bills and notes, designed to be used in circulation as money, depends upon section 23 only, under which, in the opinion of the court, the issue of *bills and notes designed for circulation as money, and payable otherwise than on demand*, is unwarranted and inexpedient.

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In the Matter of the Ohio Life Insurance and Trust Co.

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This court, therefore, executing the authority conferred by section 21 of the act of incorporation, do recommend to said company to suppress all notes and bills designed to circulate as money, and not payable on demand, and to issue such notes and bills no more; and court do order that the clerk forthwith transmit by mail to said company this act of the court, and that said company make return of their doings in this behalf to the next term of the Supreme Court in Hamilton county.

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If husband and wife unite in a mortgage, she relinquishing dower, an after sale to pay debts including the mortgage by the husband's administrator, extinguishes the dower, 15.

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1. If a plaintiff, after recovery, sell the land to the tenant in possession, he can not take out a writ of possession afterward, upon failure to complete the payments, 45.

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2. A stipulation in a deed, that the vendor may sell the land within two years if he can do so to advantage, and repay the purchase money and interest, does not constitute a mortgage, 28.
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OHIO LIFE INSURANCE AND TRUST COMPANY—

1. Has no power, under item 7 of section 7, of her charter, authorizing her "to buy and sell drafts and bills of exchange," to issue evidences of debt designed to circulate as money, 292.
2. The power to issue notes for circulation is in section 23, which confers no authority to issue notes for circulation payable otherwise than on demand, 292.

ORDINANCE OF 1787—

The ordinance of 1787 does not restrict the states formed within the Northwestern territory from affecting the navigation of navigable rivers by general regulations; it only prohibits the imposition of discriminating duties, 52.

PARTITION—

See WILLS.

1. Partition proceedings are analogous to those *in rem*, and the publication is sufficient to bind the defendant's interest, 117.
2. Partition against the wife without joining the husband will bind her, but leave the husband's interest untouched, 117-121.
3. A husband may make partition of his wife's real estate, but the right *he* acquires by the proceedings does not extinguish *hers*, that survives to her heirs, 121.
4. Partition is not effected of common property, by the conveyance by one tenant of his portion by metes and bounds, unless ratified by the cotenant, 126.
5. Partition of common lands may bind the owner, though other persons represented his right in the partition proceedings, 170.

PLEAS AND PLEADINGS—

1. It is sufficient averment of *scienter* in an indictment for having counterfeiting instruments, to state that the defendant *secretly* kept them, 133.
2. The declaration in assumpsit for installments of stock, payable on the requisition of directors, must show, with convenient certainty of time and place, the requisition, notice, etc., 136.
3. It is irregular to demur and tender an issue in fact to the same pleading, 136.

POOR—

To gain a settlement under the poor laws, the domicile, must be clear, notorious, and continuous, 76.

POST NOTES—

The Ohio Life Insurance and Trust Company has no authority to issue notes for circulation except payable on demand, 291.



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Practice.

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## PRACTICE—

1. A count for money had and received may be sustained by the exhibition of a promissory note; and when such note is in evidence it can only be rebutted by the same evidence admissible under a special count upon it, 4.
2. Trespass will not lie against a corporation, and where a corporation is joined with others in such suit, a demurrer is good for all, 31.
3. Where a divorce is decreed the wife, alimony may be ordered, first in a gross sum, and second, in installments, and execution may issue for each installment, or all due may be included in one execution, 37.
4. The irregularities of a judgment or decree on which a sale is made, can not be urged against a confirmation of sale, 37.
5. A *scire facias* to revive a dormant judgment must set forth that the requisite time has elapsed for the judgment to become dormant, 45.
6. If a plaintiff, after a recovery in ejectment, sell the premises to the tenant in possession, or abandon, he can not afterward revive the judgment, 45.
7. A bill for injunction against building a bridge over a navigable stream must clearly show that its erection will obstruct free navigation, 52.
8. If in replevin the jury find for plaintiff as to part of the goods, and for defendant as to the residue, separate judgments are entered in favor of each, with full costs, 72.
9. Courts of law and equity have concurrent jurisdiction to enforce payment of lost instruments, where discovery as well as relief is sought. Equity can secure the obligor against a recurrence of the obligation which a court of law can not, 78.
10. Declarations made by a witness of his interest in the event, are inadmissible to exclude him as incompetent, they only affect his credit, 82.
11. One of several joint sureties paying the debt must notify his co-security before he sues for contribution, 108.
12. Partition proceedings are *in rem*, and notice by publication is sufficient to bind the defendant's interest, 117.
13. Neither a plea of guilty in a criminal case, nor the judgment rendered upon it, concludes the defendant in a civil suit, but may be controverted like any other confession, 131.
14. A verdict below can not be amended in the Supreme Court on error, 131.
15. A struck jury may be demanded in a criminal case, but if demanded in term time, and struck, no objection will be received of the want of due notice of the striking, 133.
16. Where a defendant demurs and tenders issue in fact to the same pleading he should be put to elect one, and abandon the other, 136.
17. In assumpsit for installments of stock due upon subscription, the declaration must set forth, with convenient certainty, the facts of requisition, notice, etc., 136.
18. Blank indorsements on a note may be filled up at any time to obligate the indorser, or the court will regard it as done, 139.

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Promissory Notes and Bills—Record.

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**PRACTICE—Continued.**

19. A writ of *certiorari* is adopted in Ohio to correct errors in such proceedings in inferior courts as are not in conformity with the common law, 142.
20. A bastardy order is a judgment, can not be collaterally impeached, and may be enforced by execution, 149.
21. The question of actual fraud on a bill of sale *prima facie* fraudulent, is for the jury, 153.
22. Trespass lies by a proprietor of land to the center of a highway, for a direct injury to it, but if he only own to the line of the road, case is his only remedy, 165.
23. In ejectment upon a tax title, proof is requisite of the preliminary steps, the recital in the deed is not sufficient, 170.
24. A bill to set aside a judgment or decree for fraud must set forth the particular circumstances of fraud, 178.
25. An appeal lies from a decree entered by consent, 189.
26. If the record in an attachment suit does not show that notice of the pendency of the suit was given, parol proof is admissible to supply the omission, 108.
27. An injunction takes effect from its service, or the time of notice, 197.

**PROMISSORY NOTES AND BILLS—**

1. A note may be given in evidence under the common counts, and when so given can only be rebutted by the same evidence as when specially declared upon, 4.
2. Where a stranger to a note indorses it in blank at the time it is made, he may be sued as joint maker, and regarded as security—oral evidence may be given to show the intention of the parties—the indorsement may be filled at any time in form to bind the indorser as principal, or the court will regard it as filled up, 139.

**PROSECUTING ATTORNEY—**

A prosecuting attorney is not bound to attend for the state before a magistrate; and he has no power to bind the county for a constable's fees in pursuing a fugitive, 25.

**PUBLIC GROUND—**

A court-house on a public square is an occupation consistent with the use of the town, and when the building is abandoned the town may resume its rights, 80.

**RECORD—**

1. Where the final record in an attachment suit does not show that notice was given of the pendency of the suit, the fact may be proven by parol, 108.
2. If the proceeding in court be by an attorney in fact, and the record does not show that he proved his authority, the court will be presumed to have been satisfied of it, 117.

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 Registration—Specific Performance.
 

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## REGISTRATION—

See WILLS, 96.

1. An unregistered deed will be postponed to a subsequent one acquired under an attachment against the vendor, 108.
2. The registration laws apply to sheriff's sales, 184.

## RELEASE—

A release is a substantial form of conveyance in Ohio, and is good against an adverse possession, 96.

## REPLEVIN—

Where the jury find for the plaintiff for part of the goods, and for the defendant as to the residue, each takes a separate judgment with full costs, 72.

## RIVERS AND WATER-COURSES—

1. The bed of a river does not pass by a deed for land to low-water mark, thence up the river at low-water mark, etc., 13.
2. The state has power, notwithstanding the ordinance of 1787, to affect, by general provisions, the navigation of the navigable rivers in the state, making no discrimination between her own and the citizens of other states, 52.

## SCIENTER—

An averment that the defendant *secretly* kept instruments for counterfeiting, sufficiently avers a *scienter*, 133.

## SCIRE FACIAS—

A *scire facias* to revive a dormant judgment, must show that sufficient time has elapsed for it to become so, 45.

## SHERIFFS AND ADMINISTRATORS' SALES—

1. Sheriffs, administrators, etc., making sale of land, may, in their discretion, subdivide the tract levied upon and appraised entire, and sell in parcels, being responsible for abuse of the discretion, 19.
2. Administrators can only sell to pay debts upon the order of court, but the court granting the administration may order the sale of land in any other county, 67.
3. A reversal of an order confirming a sale, necessarily affects all claiming against the sale, and if the judgment creditor purchase, he is affected by error in the judgment, 142.
4. A deputy sheriff's deed, under the act of 1799, must be in the *name* of the sheriff. His acknowledgment after the sheriff's death is void, 181.
5. A purchaser at sheriff's sale, with the sale confirmed and deed ordered, will be protected as a *bona fide* purchaser, from the date of his purchase, and hold against a deed from the judgment debtor, made before the sheriff's sale, but not duly recorded until after the sale, though before the sheriff's deed, 184.

## SPECIFIC PERFORMANCE—

Will not be decreed to a purchaser who failed to make payment for nine years, and left the land, 189.

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Stages—Tenant in Common.

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**STAGES—**

Stages pay the same toll as pleasure carriages and coaches, 11.

**STOCK SUBSCRIPTIONS—**

Subscriptions to stock in corporations may be recovered in assumpsit, 136.

**SURETY—**

Where a surety received securities to indemnify himself and co-surety, he is protected from loss in their management, if he acts in good faith. He must give notice of payment to his co-surety before he sue him for contribution, 106.

**TAX SALES—**

1. Where a lot is listed for taxation with eight others, with an aggregate assessment of tax, and so advertised, a separate sale and conveyance passes no title, 43.
2. Before 1826, it was necessary that the collectors of delinquent town-lots should be sworn, 83.
3. Tax title acquired in 1822 is invalid without the collector's return of the delinquent list is sworn to before competent authority, 93.
4. Under the act of 1822 the sale may be good, though the judgment is erroneous, 154.
5. Where land is divided by a county line so that part lies in each county, each portion must be taxed in the county where it lies, and a sale of the whole in one county is void, 163.
6. A recital in a tax deed will not prove the preliminary proceedings, 170.

**TOWN PLATS—**

A contract for the sale of town lots may be enforced, though the plat has not been recorded, 201.

**TRESPASS—**

A corporation can not be sued for trespass, nor joined in such suit with an individual, 31.

**TRUST—**

1. Where lands in Ohio are conveyed in trust to B. and his heirs in Virginia, and the Virginia courts substitute another trustee, a sale made by him is void; on the death of the original trustee the land descends to his heirs in trust, 49.
2. A surety receiving securities for himself and co-surety, is not liable for loss resulting from a change of them, if he acted in good faith, 106.
3. A trust may be executed by a company obtaining corporate power after the death of the deviser, 203.

**TENANT IN COMMON—**

A purchaser from one tenant of a specified part of the common land by metes and bounds, acquires the interest of his grantor in the part conveyed. He can not throw the purchaser of a paramount title upon later purchasers of other portions. Tenants making such separate interest and their heirs are bound, and co-tenants may ratify — and among heirs chancery may mold their rights to protect the alienees of their ancestor, 126.

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Verdict—Wills.

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## VERDICT—

The Supreme Court, as a court of error, can not amend a verdict, 131.

## WILLS—

1. Under a devise to a wife to raise younger children, to hold as long as she continues the testator's widow, but when she ceases to be his widow, the land not to be disposed of until the youngest child comes of age, no partition of it can be had among the residuary legatees, until the youngest child is of full age, though the widow's estate has become extinct, 73.
2. A foreign will takes effect from the testator's death. Its registration in Ohio is merely to admit a copy in evidence, 96.

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